84-1547

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALPHA PORTLAND INDUSTRIES, INC., and THE INSURANCE AND HEALTH PLAN FOR HOURLY EMPLOYEES OF THE ALPHA PORTLAND CEMENT CO.,
Petitioners,

vs.

ROBERT ANDERSON, JR., LOUIS BANK, EUGENE L. BERG, JAMES S. BERTELSMEYER, HOWARD BRUST, RAYMOND E. COPMAN, JOHN CRITTENDON, JAMES L. DAVIS, SR., ROBERT F. DEGROOT, MATHEW L. DELARBER, ROLAND E. DOYLE, MELVIN C. DOYLE, LESLIE M. DUNARD, WILLIAM J. EHRENREICH, PAUL H. EICHELMANN, FRANK D. GARDNER, JAMES GURLEY, VICTOR O. HOFFMANN, JAMES W. HOLMAN, SIDNEY J. HOLMAN, SR., WILLIAM J. HUIGHE, RICHARD H. JUERGENS, OLIVER KARG, JR., HARRY W. KENDALL, JOSEPH E. KREJCI, ARTHUR L. MARQUARDT, MELVIN V. MEINZ, LEO H. MOLL, OLIVER D. OGLESBY, DELBERT PRICE, TILLMAN RATTY, ALBERT L. REECE, JOHN L. ROSENER, AUGUST H. ROSENER, DONALD R. ROSSO, ALBERT M. SCHEIG, HARRY C. SCURLOCK, SR., LEROY C. SEITZ, LEROY H. SIMMONS, WILLIAM STAFFORD, EUGENE L. TURNER, FRED A. WALSH, EUGENE WEIBKING, JAMES D. WILLIAMS, CHARLES ZADOW, WILLIAM B. FISCHER, CHARLES M. GAPSCH, CARL MCCOY COLEMAN, STEVE H. DUGAN, JOSEPH D. GOODWIN, LILBURN C. DEGEARE, JACK RATTY, EDWARD A. MOELLER, LOUIS F. FRANKE, STEPHEN C. SIEBENMORGEN, ORVILLE USHER, JAMES P. CARTER, KEN SPANGENBERG, T. B. WHITENER, MAX W. SCHEIBE, CHESTER W. WILLIAMS, THOMAS N. ARGENBRIGHT, SIMON KIRN, WALTER LILLICRAP (deceased), FRANK MESPLAY, ROY W. MORRISON, SR., ADOLPH F. SCHREMP, and GEORGE F. WINCH,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

561

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QUESTIONS PRESENTED

1. Did the Court of Appeals correctly rule that retired employees are not required to exhaust the mandatory grievance procedures of the collective bargaining agreement that provides the benefits they are seeking?

2. Did the Court of Appeals properly apply *Schneider Moving & Storage Co. v. Robbins,* 80 L.Ed.2d 366 (1984) — a case involving trustees who were expressly permitted by the contract to institute litigation — to this case involving retirees and a mandatory arbitration agreement?

STATEMENT OF INTERESTED PARTIES

The Equitable Life Assurance Society of the United States was also a defendant in the district court. It was named as an appellee in the Court of Appeals, but plaintiffs did not raise any issues concerning Equitable there, and it made no appearance. There are no other interested parties who are not identified in the caption. There are no parent companies, subsidiaries (except wholly owned subsidiaries) or affiliates of petitioner Alpha Portland Industries, Inc.

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ALPHA PORTLAND INDUSTRIES, INC., and THE INSURANCE AND HEALTH PLAN FOR HOURLY EMPLOYEES OF THE ALPHA PORTLAND CEMENT CO.,
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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners, Alpha Portland Industries, Inc., and The Insurance and Health Plan for Hourly Employees of the Alpha Portland Cement Co. request this Court to issue a writ of certiorari to review the order of the United States Court of Appeals for the Eighth Circuit dated January 16, 1985, which reversed the grant of summary judgment by the United States District Court for the Eastern District of Missouri.

OPINIONS BELOW

The District Court's order, dated November 12, 1982, is reported at 558 F. Supp. 913 and reproduced in Appendix A to this Petition. The majority, concurring and dissenting opinions of the three-judge panel of the Court of Appeals dated January 10, 1984, are reported at 727 F.2d 177 and reproduced in Appendix B. The majority and dissenting opinions of the Court en banc, reported at 752 F.2d 1293, are reproduced in Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on January 16, 1985, and this Petition was filed within 90 days of that date. Jurisdiction in this Court is based on 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

This action was brought by a group of retired hourly employees who formerly worked for petitioner Alpha at a cement plant in St. Louis, Missouri. Certain collectively bargained agreements are the source of their claims for a right to receive life insurance and medical benefits for the rest of their lives. All of the respondents retired in or before December 1981, when Alpha closed its St. Louis cement plant because of financial problems. Alpha thereafter announced that it was terminating insurance benefits for retirees. This action was instituted under §301 of the Labor Management Relations Act, 29 U.S.C. §185, and §502 of the ERISA, 29 U.S.C. §1132, and respondents con-

tend that they are entitled to lifetime benefits under one or more of the collectively bargained agreements.

The insurance plan provided that disputes concerning the insurance program "shall be subject to the grievance procedure" of the collective bargaining agreement. The collective bargaining agreement, in turn, provided for a grievance procedure and, ultimately, for arbitration, and these remedies were deemed mandatory by the courts below, at least insofar as active employees are concerned.

The United States District Court for the Eastern District of Missouri granted summary judgment to petitioner by reason of respondents' admitted failure to exhaust the contractual grievance and arbitration procedure. Apdx. A. A divided three-judge panel of the Eighth Circuit reversed, holding that the union owes no duty to fair representation to retirees. Apdx. B. Alpha's petition for rehearing en banc was granted. After this Court's decision in *Schneider Moving & Storage Co. v. Robbins,* 80 L.Ed.2d 366 (1984), the en banc court reversed, with Judge Bright again dissenting. The majority held that there is no presumption of arbitrability for retirees, relying heavily on *Allied Chemical & Alkali Workers, Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). The majority also read *Schneider* as carving out a giant exception to the presumption for virtually everyone except active employees:

> "We must conclude that retirees are more similarly situated with trustees than with active employees and are equally 'outside the collective bargaining relationship.' " Apdx. C at p. A-33.

The majority further ruled that in the absence of a presumption of arbitrability, the contract could not be construed as requiring exhaustion of grievance procedures because it referred only to employees and nowhere mentioned retirees.

Judge Bright dissented from both the panel and en banc opinions, contending that the majority had misconstrued *Schneider* and that the retirees were required to utilize the remedies provided in the contract which is the source of their claim.

REASONS FOR GRANTING THE WRIT

The Court Of Appeals Incorrectly Held (a) That There Is No Presumption Of Arbitrability With Regard To Contractual Rights Of Retired Employees And (b) That The Rationale Of *Schneider* Applies To Retirees.

Admittedly, the alleged rights being pursued by respondents have their origin in one or more collective bargaining agreements. In *Vaca v. Sipes*, 386 U.S. 171, 184 (1967), this Court said:

> "Since the employee's claim is based upon breach of the collective bargaining agreement, he is bound by terms of that agreement which govern the manner in which contractual rights may be enforced."

Clearly, if respondents were still actively at work, they would be subject to the exhaustion requirements of *Vaca*. The question presented by this case, therefore, is whether their status as ex-employees excuses them from that obligation. That question would appear to have been answered in the negative by *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). In *Maddox*, the Court held that a claim for severance pay—which necessarily could only be made by a former employee—was subject to the mandatory administrative remedies provided by the collective bargaining agreement. The Court applied the "general rule" which "requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress." *Id.* at 652. The Court also applied the presumption of arbitrability to the contract in *Maddox*, ruling that language using the permissive "may" should be construed to require the use of the grievance procedure. The suggestion that claimants who had accepted the end of their employment as final should be free to avoid the contract procedure was rejected with the admonition that "any doubts must be resolved against such an interpretation." *Id.* at 659.

The Eighth Circuit in this case leaned heavily upon *Allied Chemical & Alkali Workers, Local No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), and *Schneider Moving & Storage Co. v. Robbins*, 80 L.Ed.2d 366 (1984), to destroy the presumption of arbitrability recognized in the *Steelworkers Trilogy* and reinforced in *Maddox*. This was an unwarranted and inappropriate extension of this Court's decisions.

Allied Chemical merely held that unions and management are not required to bargain over a change in retirees' benefits. The Court expressly emphasized that the issue before it—whether retirement rights were the subject of mandatory collective bargaining—was distinct from the enforcement of retirement rights. 404 U.S. at 176 n.17. Thus, it was plainly improper for the Eighth Circuit to use *Allied Chemical* (or the fact that retirees are not part of a bargaining unit) to restrict *Maddox*. *See* Apdx. C at p. A-31.

Allied Chemical in fact noted that retirees' rights could be the subject of collective bargaining, and nothing in the Court's opinion suggested that such rights included in a collective bargaining agreement could be enforced outside the grievance procedure specified by that agreement. In short, the Eighth Circuit totally ignored the critical difference between a union's role in negotiating new benefits and its role in enforcing the benefits it has already negotiated.

The Eighth Circuit also misapplied *Schneider* to this case. *Schneider* involved a dispute between trustees of two multi-employer pension trusts and two employers. The trust agreement did not contain any arbitration provision but, in fact, provided that:

> "The board of trustees shall take such steps, including the institution and prosecution of, and intervention in, any legal proceedings as the trustees in their discretion deem in the best interest of the fund . . . ." 80 L.Ed.2d at 372.

The trustees had never been parties to or beneficiaries of the collective bargaining agreement. The trustees had never been represented by the union, and the union owed no statutory duty to, and had no contractual relationship with, the trustees. The trustees' rights were created by a separate instrument which made no reference whatever to the contractual remedies of any collective bargaining agreement. Since the agreements did not provide for any arbitration by trustees, and since the trustees were specifically authorized to file suit, the Court ruled that they were not subject to any exhaustion requirement.

Schneider is inapposite here. Here, the retirees had a long-standing relationship with a union which had negotiated the very benefits the retirees are seeking to extend. The insurance program which respondents are seeking to enforce specifically references the grievance procedure of the collective bargaining agreement, and it does not authorize independent court actions.

The decision below also conflicts with the analysis of a number of lower court decisions. In *McLaughlin v. E-Systems, Inc.*, 403 F. Supp. 67, 69 (N.D. Tex. 1975), the court expressly required retirees to exhaust their contractual remedies. In *Local 589 v. Kellwood Co.*, 592 F.2d 1008 (8th Cir. 1979), and *United Steelworkers of America v. Canron, Inc.*, 580 F.2d 77 (3d Cir. 1978), the arbitration of contract claims of retirees was specifically approved. *Kellwood* involved a dispute over pension rights, which the court held was arbitrable, saying: "where the parties have agreed to arbitrate all disputes requiring interpretation of a collective bargaining agreement, the question of arbitrability focuses upon whether the disputed obligation was arguably created by that agreement." 592 F.2d at 1011-12.

In *Textile Workers of America v. Columbia Mills, Inc.*, 471 F. Supp. 527 (N.D.N.Y. 1978), the employer relied on *Allied Chemical* in support of its contention, strikingly similar to the Eighth Circuit's analysis here, that there was no agreement to arbitrate grievances concerning retirees because the collective bargaining agreement referred to a difference between "the

employer and union or an employee." The Court in *Columbia Mills* rejected this contention and emphasized that the dispute there, as here, was properly between the employer and the union. It expressly rejected as illogical the suggested extension of a union's freedom to refrain from negotiating new provisions on behalf of retired employees to the point where any duty to represent them was eliminated, even with respect to the administration of contract terms negotiated before their retirement. The Court specifically stated, at 530-31:

> "Here, unlike [*Allied Chemical*], the issue is not whether the company must bargain with the union over the benefits of retired employees, but rather whether the company did, in fact, contractually commit itself to provide continuous insurance coverage for retirees for the duration of their natural lives. If the company made such a commitment in the collective bargaining agreement it entered into with the union, then under accepted contract principles the union has a legitimate interest in protecting the rights of the retirees and is entitled to seek enforcement of the applicable contract provisions. *United Steelworkers of America v. Canron, Inc.*, 580 F.2d 77, 80-88 (3d Cir. 1978)."

Accord, Rosen v. Public Service Electric & Gas Co., 477 F.2d 90 (3d Cir. 1973).

The suggestion by the Court of Appeals that arbitration is inappropriate here because this case involves the "law of the land" rather than the "law of the shop," Apdx. C at p. A-38, exemplifies the court's failure to comprehend that this case, like any other labor arbitration, turns on the meaning of a collectively bargained agreement between an employer and a union. The Eighth Circuit has created the anomalous and undesirable situation that an individual whose retirement benefits are altered two days before he retires is required to arbitrate his dispute but that an individual whose benefits are altered four days later need not do so.

Finally, the decision below would eviscerate the benefits of the *Steelworkers Trilogy* and hinder the federal courts. Many employers today are feeling the pinch of foreign competition, declining demand for certain products and, in some cases, obsolescence of facilities. Many members of the post-war work force have reached or are reaching retirement. As a result, the number of retirees has grown dramatically. If the decision of the Eighth Circuit in this case stands unreviewed by this Court, disputes by retirees, including but not limited to persons retired as a result of the large number of plant closings in the past few years, will clog the federal courts for years, rather than being relegated to the arbitral remedy designed to deal with matters of this type. Indeed, the Eighth Circuit's analysis is not limited to any particular kind of retiree disputes, and the Court of Appeals has thus abrogated any presumption of arbitrability for every individual medical expense or other benefit claimed by a retiree.

To prevent *Schneider* from being read as creating a giant loophole in the *Steelworkers Trilogy* and *Vaca v. Sipes,* this Court should grant certiorari and reverse the judgment of the Court of Appeals.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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April 1, 1985

APPENDIX

APPENDIX A

Robert Anderson, Jr., et al.,
Plaintiffs,

v.

Alpha Portland Industries, Inc., et al.,
Defendants.

No. 82-1413C(4).

United States District Court,
E.D. Missouri, E.D.

Nov. 12, 1982.

On Motion for New Trial March 4, 1983.

MEMORANDUM

HUNGATE, District Judge.

This matter is before the Court on various pretrial motions.

Plaintiffs are all retired employees of the defendant Alpha Portland Industries, Inc. (Alpha) formerly employed by its division, Alpha Portland Cement Company at the division's St. Louis facility. Jurisdiction is invoked pursuant to the Employee Retirement Income Security Act (ERISA) § 502, 29 U.S.C. § 1132 and the Labor-Management Relations Act (LMRA) § 301, 29 U.S.C. § 185.

Also named as a defendant is the Insurance and Health Plan for Hourly Employees of Alpha Portland Cement Company; Alpha administers the aforesaid Plan, which is represented by the same counsel herein, and both entities will be referred to below collectively as Alpha. The Equitable Life Assurance Society of the United States (Equitable) is also named as a defendant.

Plaintiffs assert their claims as beneficiaries of certain collective bargaining agreements and related insurance agreements ex-

ecuted from time to time by Alpha and plaintiffs' union representatives, none of whom have been joined in this action. It is the retirees' contention that they are entitled to life insurance and hospitalization and surgical benefits enforceable under the agreements for the remainder of their lives. By their initial complaint, they seek mandatory injunctive relief and compensatory damages.

Due to adverse business conditions, Alpha either closed or sold the assets of its six remaining cement plants during the period from 1978 to September, 1982, including the St. Louis plant. Following consultations and negotiations with both the international and remaining local unions during 1981 and 1982, Alpha terminated the pertinent coverage effective May 1, 1982, upon expiration of all existing collective bargaining agreements. All retirees were notified of the proposed action March 29, 1982. Thereafter, Alpha concluded labor contracts with its existing employees to cover the period up to its liquidation of the remaining cement plants. These last agreements expressly excluded the benefits now in controversy.

Alpha moves for summary judgment pursuant to Rules 12(b)(1), 12(b)(6), and 56(a) of the Federal Rules of Civil Procedure. It is Alpha's contention that the rights in dispute are governed by labor contracts containing grievance procedures which culminate in binding arbitration. It states that plaintiffs have failed to exhaust these contractual remedies. Based on well-established principles favoring exhaustion of such remedies under federal labor and pension laws, Alpha contends that subject matter jurisdiction may not be assumed over this dispute.

Alpha correctly asserts that

> "It is settled principle that no action can be brought under 29 U.S.C. § 185(a) until a party attempts to exhaust his contractual remedies as to any claim." *Petersen v. Rath Packing Co.*, 461 F.2d 312, 315 (8th Cir.1972); *Bonnot v. Congress of Independent Unions Local # 14,* 331 F.2d 355 (8th Cir.1964). Exhaustion of nonjudicial remedies must

> be pled in a complaint. *Hayes v. New England Millwork Distributors,* 602 F.2d 15, 18 (1st Cir.1979).

International Molders and Allied Workers Union v. Aquarius Shoe Corp., 511 F.Supp. 361, 363 (E.D.Mo.1981); *see Republic Steel Corp. v. Maddox,* 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965); *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960).

The same requirement of exhaustion of contract remedies applies to suits under ERISA. *E.g., Challenger v. Local Union 1, International Bridge, Structural & Ornamental Ironworkers,* 619 F.2d 645, 647 (7th Cir.1980); *Amato v. Bernard,* 618 F.2d 559, 566-68 (9th Cir.1980); *Carpenters Local No. 1846 v. Pratt-Farnsworth, Inc.,* 511 F.Supp. 509, 515 (E.D.La.1981); *see Sample v. Monsanto Co.,* 485 F.Supp. 1018, 1019 (E.D.Mo. 1980).

It is plaintiffs' position that they are entitled to life-long insurance coverage because such benefits were "vested" upon their retirement and could not thereafter be defeated by Alpha's unilateral action or bargained away in subsequent negotiations. Alpha denies any such liability on a variety of grounds.

Regardless of the merits of these contentions, plaintiffs' central allegation is that Alpha failed to honor an alleged commitment made in the bargaining process:

> That the cancellation of said insurance coverage constitutes a violation of the prior collective bargaining agreements with plaintiffs' collective bargaining representatives under which plaintiffs retired, violates the terms of the various plans then extant and in effect at the time of retirement, and further violates the terms of the summary plan description.

Complaint ¶ 23.

Whatever rights they now assert stem from the "Insurance and Health Agreement of Alpha Portland Industries, as amended May 1, 1978, and its predecessor agreements (collectively referred to as the Insurance Agreement)." Complaint Exhibit 1. The agreement embodied in that exhibit was an appendix to the 1978 collective bargaining agreement (the Basic Agreement) executed by Alpha, the United Cement, Lime and Gypsum Workers International Union (the International Union) and the various local unions at Alpha's plants then operating throughout the country.

Sections 1 and 2 of Article XII of the 1978 Insurance Agreement specify the life insurance, hospitalization and surgical benefits available to Alpha retirees who retired during all periods commencing from November 1, 1948 up to April 30, 1979.

The Insurance Agreement at Article II, § 5, specifies that:

> Any difference arising under this Program respecting the administration, determination and/or implementation of the Program shall be subject to the grievance procedure established in the Basic Agreement beginning with Step 2 of such procedure.

Complaint Exhibit 1. Plaintiffs nowhere dispute that this suit concerns a difference respecting the administration, determination, and/or implementation of the "Program," as that term is elsewhere defined within the Insurance Agreement to include the benefits presently in controversy. The method for processing a grievance is clearly set out in the 1978 Basic Agreement for the St. Louis plant.

Plaintiffs' argument that binding arbitration is not required by these agreements is not persuasive. The Court is of the opinion that they are clear and unambiguous in establishing a binding method of dispute resolution. Alpha Exhibits 13-23, 26-28. *See Challenger, supra* at 647.

Plaintiffs also contend there are other reasons why they should not be bound by the grievance process. They cite their status as retirees, the dissolution of the local union, the St. Louis plant closure, and Alpha's alleged favorable negotiating position as to any such grievance, as reasons in support of the present litigation. (*E.g.*, Plaintiffs Price and Ratty affidavits).

None of these arguments excuses the required exhaustion of remedies. Plaintiffs' status as retirees does not distinguish their claims. Neither does it deny the international union's authority to vindicate their rights.

Plaintiffs mistakenly rely on *Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 92 S.Ct. 383, 30 L.Ed.2d 341 (1971) for the proposition that the representational authority of the unions ceased upon their retirement. That case is inapposite:

> In *Pittsburgh Plate Glass,* the Supreme Court held that the retirement benefits of already retired employees were not a mandatory subject of bargaining under the National Labor Relations Act.
>
> * * * * * *
>
> The issue presented in this case is different than that considered in *Pittsburgh Plate Glass.* Here, unlike the latter cited case, the issue is not whether the Company must bargain with the Union over the benefits of retired employees, but rather whether the Company did, in fact, contractually commit itself to provide continuous insurance coverage for retirees for the duration of their natural lives. If the Company made such a commitment in the collective bargaining agreement it entered into with the Union, "then under accepted contract principles the union has a legitimate interest in protecting the rights of the retirees and is entitled to seek enforcement of the applicable contract provisions." *United Steelworkers of America, AFL-CIO v. Canron, Inc.*, 580 F.2d 77, 80-81

> (3d Cir.1978) (footnote omitted). For these reasons, the Third Circuit in *United Steelworkers of America v. Canron, Inc., supra,* recently affirmed a District Court Order directing that arbitration proceed between an employer and a union over the question of insurance coverage for retirees.

Textile Workers of America, AFL-CIO, Local 129 v. Columbia Mills, Inc., 471 F.Supp. 527, 530-31 (N.D.N.Y.1978); *see also Local 589, International Ladies' Garment Workers' Union, AFL-CIO v. Kellwood Company,* 592 F.2d 1008, 1011-12 (8th Cir.1979); *McLaughlin v. E-Systems, Inc.*, 403 F.Supp. 67, 69-70 (N.D.Tex.1975). The *Columbia Mills* opinion goes on to state at 531:

> Finally, the Company argues that the termination of the collective bargaining agreement and the cessation of operations by the Company renders arbitration ineffective and inappropriate. . . . However, in light of the Supreme Court's decision in *Nolde Brothers, Inc. v. Local No. 358, AFL-CIO* [430 U.S. 243, 97 S.Ct. 1067, 51 L.Ed.2d 300], *supra,* these arguments must be rejected.
>
> • • • • • •
>
> In the present case, as in *Nolde Brothers,* the dispute arises under the collective bargaining agreement since the underlying claim rests upon the proper interpretation to be given to the relevant contract provisions. Therefore, the fact that the collective bargaining agreement has been terminated, and the fact that the Company's operations have ceased does not provide a sufficient reason to bar arbitration of the grievance presented in this case.

As to the other reasons offered to excuse exhaustion, it is plaintiffs' burden to show why contract remedies have not been complied with and this record clearly does not do so. *Wolf v. National Shopmen Pension Fund,* 512 F.Supp. 1182, 1183

(E.D.Pa.1981); *see Ritter v. Western Electric Co.*, 504 F.Supp. 886 (E.D.Pa.1980) and cases cited therein. For example, plaintiffs may not rely, as they have attempted to, on the casual remarks of union officials to sidestep the established system of industrial self-governance. *Ritter, id.* at 890.

Finally, plaintiffs assert they formally requested continuation of the benefits by counsel's letter of June 1, 1982 (complaint exhibit 5). They argue that Alpha waived any right to insist on contractual remedies by failing to respond within 90 days with a written statement of the reasons for denial of what they allege was a "claim" for benefits. ERISA § 503(1), 29 U.S.C. § 1133(1), and 29 C.F.R. § 2560.503-1(a)(3). Plaintiffs have presumed that this satisfies the exhaustion requirement which is a precondition to any action in this Court. Plaintiffs more fully argue these points in their cross-motion for summary judgment against Alpha. The arguments are without merit. *Challenger, supra* at 648; *Wolf v. National Shopmen Pension Fund, supra* at 1183.

For all of the foregoing reasons, Alpha's motion for summary judgment will be granted.

Plaintiffs also seek relief against Equitable alleging that it was the insurance carrier under the Insurance Agreement and as such is a party-in-interest pursuant to ERISA § 3(14)(B); 29 U.S.C. § 1002(14)(B). In consequence of the Court's decision to grant summary judgment in favor of Alpha as to the underlying complaint, the claim against Equitable will be dismissed.

In view of these determinations, all other pending motions in this case will be denied as moot.

The Court's order of September 23, 1982, setting a hearing as to class certification in this matter will be vacated as moot.

APPENDIX B

Robert Anderson, Jr., et al.,
Appellants,
v.
Alpha Portland Industries, Inc., et al.,
Appellees.

No. 83-1358.

UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT.

Submitted June 15, 1983.

Decided Jan. 10, 1984.

Rehearing En Banc Granted
Feb. 29, 1984.

Before BRIGHT and J.R. GIBSON, Circuit Judges, and HANSON,* Senior District Judge.

HANSON, Senior District Judge.

Plaintiffs are former employees of defendant Alpha Portland Industries, Inc. (Alpha). Plaintiffs claim insurance benefits under collective bargaining agreements in effect when they retired. Plaintiffs' action was dismissed below on summary judgment for failure to exhaust contractual remedies. Plaintiffs appeal. We reverse on the ground that plaintiffs are not required to exhaust the contractual remedies.

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* The HONORABLE WILLIAM C. HANSON, United States Senior District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

I. FACTS

From 1941 to 1982 Alpha was engaged in the cement production business. During this period Alpha operated as many as ten cement plants, including the St. Louis plant at which plaintiffs were employed.

Plaintiffs worked for Alpha under collective bargaining agreements negotiated by the United Cement, Lime and Gypsum Workers (the Union). Plaintiffs retired at various times between 1955 and 1981. All collective bargaining agreements in effect when plaintiffs retired provided life and health insurance for active and retired employees. The collective bargaining agreements referred to a group insurance plan which was embodied in a separate insurance agreement. All collective bargaining agreements in effect when plaintiffs retired also contained grievance and arbitration procedures. These procedures varied during the period in which plaintiffs retired. The latest variation was as follows:

> When an employee has a grievance he shall . . . make an effort to arrive at a satisfactory settlement with his foreman. Failing to do so, he or his representative may take the matter up with the Plant Manager . . . . [T]he matter shall then be submitted in writing to the Director of Industrial Relations of the Company. After full consideration and such conferences as may be mutually agreed upon with a representative of the International Union of Cement, Lime and Gypsum Workers, the matter shall be considered settled when the employee's and the Company's representatives have reached an agreement. . . . . If an agreement cannot be reached in this manner, the matter may by mutual agreement be submitted to arbitration in such manner as shall be acceptable to both parties.

Earlier grievance and arbitration procedures were essentially similar but referred to different management personnel in the grievance procedure. After 1973 the insurance agreements pro-

vided that any insurance dispute would be subject to the grievance procedure in the collective bargaining agreement, beginning with step two.

Only one summary plan description of the insurance plan was in evidence below—one effective May 1, 1978. This summary plan description provided alternative procedures to appeal the denial of a claim. According to the summary plan description an appeal could be made through the grievance procedure in the collective bargaining agreement or by filing a written appeal with Alpha's personnel department.

As a result of financial problems, Alpha permanently closed its St. Louis plant in December of 1981, and the local union was dissolved. Subsequently, Alpha terminated insurance benefits for retirees.

Without exhausting their contractual remedies, plaintiffs' brought this action under § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185, and § 502 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132. Plaintiffs claimed a right to insurance benefits for the rest of their lives under the various collective bargaining agreements in effect when they retired.

After plaintiffs' action was filed, Alpha sold its last cement plant and has not operted any cement plants since.

After Alpha had sold its last cement plant, the district court, 558 F.Supp. 913, granted defendants' motion for summary judgment on the ground that plaintiffs had failed to exhaust their contractual remedies.

II. DISCUSSION

A. The Exhaustion Requirement.

As a general rule, employees claiming rights under a collective bargaining agreement are required to exhaust remedies provided in the collective bargaining agreement before bringing suit

against their employer under LMRA § 301, 29 U.S.C. § 185. *Clayton v. UAW*, 451 U.S. 679, 681, 101 S.Ct. 2088, 2091, 68 L.Ed.2d 538 (1981); *Warren v. International Brotherhood of Teamsters*, 544 F.2d 334, 337-38 (8th Cir.1976). Other circuits have applied this exhaustion requirement to suits under ERISA § 502, 29 U.S.C. § 1132. *See Kross v. Western Electric Co.*, 701 F.2d 1238, 1244 (7th Cir.1983); *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 527-29 (5th Cir.1982) (discussion assumes general exhaustion requirement); *Amato v. Bernard*, 618 F.2d 559, 566-68 (9th Cir.1980); Annot. 54 A.L.R.Fed. 364 (1981). *Cf. Air Line Pilots Ass'n v. Northwest Airlines*, 627 F.2d 272, 275-76 (D.C.Cir. 1980) (Railway Labor Act's arbitration requirement applied to suit to which ERISA and the Railway Labor Act both applied). We are persuaded to require exhaustion under ERISA by the Ninth Circuit's analysis in *Amato v. Bernard*, 618 F.2d 559. Since plaintiffs brought suit under LMRA and ERISA claiming rights under collective bargaining agreements, they are required to exhaust the grievance and arbitration provisions in those agreements, absent some exception to the exhaustion requirement.

B. Exception to the Exhaustion Requirement.

The exhaustion requirement is subject to exceptions. *Glover v. St. Louis—San Francisco Railway*, 393 U.S. 324, 329-30, 89 S.Ct. 548, 551-52, 21 L.Ed.2d 519 (1969); *Vaca v. Sipes*, 386 U.S. 171, 185-86, 87 S.Ct. 903, 914-15, 17 L.Ed.2d 842 (1967). An exception for the breach of a union's duty of fair representation has been recognized where the union has sole power to proceed with the contractual remedy and has wrongfully refused to proceed with an employee's complaint. *Id.* at 185, 87 S.Ct. at 914. An exception has also been recognized where exhaustion would be futile. *Glover*, 393 U.S. at 330, 89 S.Ct. at 551. One situation in which futility has been found is where it can be anticipated that a union in control of the contractual remedy would breach its duty of fair representation if the employee

were required to exhaust. For example, futility has been found where the employee's underlying complaint involves an accusation of wrongdoing against the union, *see Battle v. Clark Equipment Co.*, 579 F.2d 1338, 1345-46 (7th Cir.1978); *Hiller v. Liquor Salesmen's Union Local No. 2,* 338 F.2d 778 (2d Cir.1964); *see also Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 511, 513 (9th Cir.1978), and where the union has breached its duty to the employee in previous cases, *see Waters v. Wisconsin Steel Works of International Harvester Co.*, 427 F.2d 476, 489-90 (7th Cir.) *cert. denied,* 400 U.S. 911, 91 S.Ct. 137, 27 L.Ed.2d 151 (1970).

If an actual or anticipated breach of the duty of fair representation by a union in control of the contractual remedy is sufficient to excuse exhaustion, then exhaustion should also be excused where the union is in control of the contractual remedy but owes no duty of fair representation to the plaintiff. A plaintiff should not be relegated to a remedy controlled by a party who owes the plaintiff no duty.

In this case the Union is in control of the contractual remedy under the provision of the grievance procedure that a grievance shall be considered settled when Alpha and the Union reach an agreement.

Because plaintiffs are retirees the Union owes them no duty of fair representation.

A union's duty of fair representation arises from its status as exclusive representative of the employees within the bargaining unit, which deprives individual employees of the ability to deal directly with their employer. *DelCostello v. International Brotherhood of Teamsters,* ____ U.S. ____, 103 S.Ct. 2281, 2290 n. 14, 76 L.Ed.2d 476 (1983); *Humphrey v. Moore,* 375 U.S. 335, 342, 84 S.Ct. 363, 367, 11 L.Ed.2d 370 (1964); *Smith v. Hussmann Refrigerator Co.*, 619 F.2d 1229, 1235 (8th Cir.), *cert. denied,* 449 U.S. 839, 101 S.Ct. 116, 66 L.Ed.2d 46 (1980). Thus the union's duty runs to the employees in the bargaining

unit. *Bowen v. United States Postal Service,* ____ U.S. ____, 103 S.Ct. 588, 597, 74 L.Ed.2d 402 (1983); *Hussmann,* 619 F.2d at 1235. It follows that the union owes no duty to persons who are not employees in the bargaining unit. This proposition is illustrated by *Cooper v. General Motors,* 651 F.2d 249 (5th Cir.1981). In *Cooper,* prior collective bargaining agreements provided that if an employee left the bargaining unit to become a supervisor and subsequently returned to the bargaining unit, the time spent as a supervisor would count toward the employee's seniority in the unit. A later collective bargaining agreement dropped this provision. Supervisors who were formerly members of the bargaining unit claimed that they had relied on the prior collective bargaining agreements in becoming supervisors and that the union had breached its duty of fair representation. The court held that the union owed no duty to the supervisors because they were not employees within the bargaining unit, even though the supervisors were formerly within the unit and the union had formerly negotiated benefits for them based on their status as former unit members.

In *Allied Chemical & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.,* 404 U.S. 157, 92 S.Ct. 383, 30 L.Ed.2d 341 (1971), the Supreme Court made clear that retirees cannot be employees within a bargaining unit by holding that retirees are not "employees" within the meaning of the collective bargaining obligations of the National Labor Relations Act. The issue in *Allied Chemical* was whether the employer committed an unfair labor practice in dealing directly with retirees concerning their insurance benefits. The Court held that such dealing was not an unfair labor practice because the employer's duty to bargain collectively extended only to mandatory subjects of collective bargaining, that is, to the terms and conditions of employment of employees within the bargaining unit. The Court held that retiree benefits are not mandatory subjects of collective bargaining because retirees are not employees and retiree benefits do not vitally affect employees.

The Court's decision in *Allied Chemical* placed retirees outside of the bargaining unit and sanctioned direct dealing between employer and retirees. *See Local 134, UAW v. Yard-Man Inc.*, 716 F.2d 1476 at 1484-1486 (6th Cir.1983). It should follow that the union owes no duty of fair representation to retirees since the union's duty runs only to employees within the bargaining unit for whom the union acts as exclusive bargaining representative. The Court recognized this implication of its logic in noting that "since retirees are not members of the bargaining unit, the bargaining agent is under no statutory duty to represent them in negotiations with the employer." *Allied Chemical,* 404 U.S. at 181 n. 20, 92 S.Ct. at 398 n. 20; *see also Yard-Man,* 716 F.2d at 1486 n. 16. However, the *Allied Chemical* noted that a union may bargain for retiree benefits if it chooses to do so—retiree benefits remain a permissive subject of bargaining. *Allied Chemical,* 404 U.S. at 181 n. 20, 92 S.Ct. at 398 n. 20.

In *UMW Health & Retirement Funds v. Robinson,* 455 U.S. 562, 102 S.Ct. 1226, 71 L.Ed.2d 419 (1982), the Supreme Court made clear that by choosing to bargain for retiree benefits a union acquires no duty to retirees, at least as to the contents of the agreement ultimately reached with the employer. In *Robinson,* widows of retirees challenged the level of health benefits for retirees' widows provided in a collective bargaining agreement. The Court rejected this challenge stating:

> [F]ormer members and their families may suffer from discrimination in collective-bargaining agreements because the union need not "affirmatively . . . represent [them] or . . . take into account their interests in making bona fide economic decisions in behalf of those whom it does represent." *Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.,* 404 U.S. 157, 181 n. 20 [92 S.Ct. 383, 398 n. 20].

Robinson, 455 U.S. at 574-75, 102 S.Ct. at 1233-34.

Defendants attempt to limit *Allied Chemical* and *Robinson* to the negotiation phase of the collective bargaining process. Defendants argue that if a union actually negotiates a collective bargaining agreement containing retiree benefits, the union then acquires a duty to fairly represent retirees in administering the agreement through such mechanisms as grievance and arbitration. The Supreme Court has recognized a distinction between the union's role in contract negotiations and its role in contract administration. *Allied Chemical,* 404 U.S. at 171 n. 11, 92 S.Ct. at 393 n. 11. Further, it has been held that a union can force an employer to arbitrate disputes concerning retiree benefits. *Local 589, International Ladies' Garment Workers' Union v. Kellwood Co.,* 592 F.2d 1008 (8th Cir.1979); *United Steelworkers v. Canron, Inc.,* 580 F.2d 77, 80-81 (3rd Cir.1978). However, a union could have power to force arbitration over retiree benefits due to the active employees' interest in those benefits and yet owe no duty to fairly represent retirees in arbitration over retiree benefits. In holding that the union may force arbitration over retiree benefits, the Third Circuit noted the Supreme Court's statement in *Allied Chemical* that the union "is under no duty to represent [retirees]." *Canron,* 580 F.2d at 81 n. 6.

The Supreme Court's decisions in *Allied Chemical* and *Robinson* contain broad language implying that a union owes *no* duty of fair representation to retirees, even in administering retiree benefits contained in a collective bargaining agreement. For example, the Court stated in both cases that the union is not required "affirmatively to represent non-bargaining unit members or to take account of their interests in making bona fide economic decisions in behalf of those whom it does represent." *Allied Chemical,* 404 U.S. at 181 n. 20, 92 S.Ct. at 398 n. 20; *Robinson,* 455 U.S. at 574-75, 102 S.Ct. at 1233-34. In discussing the protection for retirees when a union chooses to bargain for retirees benefits, the Court did not point to any union duty created when the union negotiates retiree benefits, rather the Court pointed to "established contract principles"

under which vested rights could not be altered without retirees' consent and to the fact that a retiree "would have a federal remedy under § 301 of the Labor Management Relations Act for breach of contract if his benefits were unilaterally changed." *Allied Chemical,* 404 U.S. at 181 n. 20, 92 S.Ct. at 398 n. 20.

In *Robbins v. Prosser's Moving and Storage Co.,* 700 F.2d 433 (8th Cir.), *cert. granted,* ____ U.S. ____, 104 S.Ct. 66, 78 L.Ed.2d 81 (1983), a majority of this court, sitting *en banc,* interpreted *Allied Chemical* to mean that a union has no duty to fairly represent retirees in administering retiree benefits contained in a collective bargaining agreement. The issue in *Robbins* was whether the trustees of an employee pension fund must exhaust contractual remedies before suing an employer for performance of the employer's obligations to the fund under a collective bargaining agreement where the dispute involves questions of contract interpretation. This court held that the trustees were not required to exhaust. Part of the court's rationale was that the union would not adequately represent the fund in contractual grievance and arbitration. In making this argument the court stated, "As the Supreme Court has held [in *Allied Chemical*], the union has no affirmative duty to represent those who are no longer members." *Robbins,* 700 F.2d at 442.

Imposing a duty on unions to fairly represent retirees in contract administration and requiring retirees to exhaust contractual remedies would have consequences that argue strongly for freeing unions of any such duty and excusing retirees from the exhaustion requirement.

As the Supreme Court noted in *Allied Chemical,* forcing a union to represent both active employees and retirees "would create the potential for severe internal conflicts that would impair the [bargaining] unit's ability to function and would disrupt the process of collective bargaining" because active employees and retirees "do not share a community of interest broad enough to justify inclusion of the retirees in the bargaining unit." *Allied Chemical,* 404 U.S. at 173, 92 S.Ct. at 394. The

dificulty for the union in representing both active employees and retirees is most apparent in the contract negotiation process. In contract negotiation the conflict of interest between the active employees and the retirees is made clear as the total benefits available from the employer are divided between active employees and retirees. Though the conflict is clearer in the negotiation process, there is also a conflict of interest between active employees and retirees in the contract administration process. In contract administration the union must choose which grievance to pursue with limited resources. More resources spent pursuing retiree grievances means less available for grievances of active employees. Further, a victory for a retiree in a contract administration matter may ultimately be paid for by the active employees. If a retiree victory reduces the employer's assets, there will be less available for future benefits to active employees.

In addition to creating difficulties for the union, the conflict of interest between active employees and retirees also threatens the retirees' interests. The threat is to the retirees' interests, not the active employees' interests, because of the politics of the situation. The union leadership has a political interest in serving the interests of the active employees because the active employees vote in union certification elections and union leadership elections. The union leadership has no political interest in serving the interests of retirees because retirees do not vote in union certification elections and generally do not vote in union leadership elections. *See generally Allied Chemical,* 404 U.S. at 174-75, 92 S.Ct. at 395-96; E. Clauge, B. Palli, L. Kramer, *The Aging Worker and the Union,* 124 (1971). Thus, the politics of the situation dictate that conflicts between the active employees and retirees will be resolved in favor of the active employees.

Imposing a duty on the union to fairly represent retirees would not adequately protect retirees. The Supreme Court noted in *Allied Chemical* that if a union represented both active

employees and retirees it could legitimately favor active employees at the expense of retirees. *Allied Chemical,* 404 U.S. at 173 & n. 12, 92 S.Ct. at 394 & n. 12. This is true because a breach of the duty of fair representation occurs only when the union's conduct is "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes,* 386 U.S. 171, 190, 87 S.Ct. 903, 916, 17 L.Ed.2d 842 (1967). Under this standard there is not necessarily any breach of the union's duty in supporting the position of one group within the bargaining unit against that of another. *Humphrey v. Moore,* 375 U.S. 335, 349, 84 S.Ct. 363, 371, 11 L.Ed.2d 370 (1964). This is justifiable where the individuals whose interests are slighted by the union at one point will derive benefits in the future from continued union representation. As the Supreme Court has noted, "The collective bargaining system . . . of necessity subordinates the interests of an individual employee to the collective interests of all employees in the bargaining unit." *Vaca v. Sipes,* 386 U.S. at 182, 87 S.Ct. at 912. However, it would be difficult to justify a union's favoring active employees over retirees in the administration of retiree benefits, given that the union has no duty to negotiate benefits for retirees in future collective bargaining agreements. *UMW Health & Retirement Funds v. Robinson,* 455 U.S. 562, 574-75, 102 S.Ct. 1226, 1233-34, 71 L.Ed.2d 419 (1982).

In this case, the problems generally created by the conflict of interest between active employees and retirees are mitigated by the fact that Alpha no longer has any active employees. However, a conflict of interest still exists. Since the local union has been dissolved, the international union would represent plaintiffs in the contractual grievance and arbitration procedures. Because the international represents the active employees of other employers, the international would face a conflict of interest in allocating its resources between the pursuit of plaintiffs' grievance and the pursuant of benefits for the active employees of other employers.

Imposing a duty on unions to fairly represent retirees in contract administration and requiring retirees to exhaust contractual remedies would also hurt the dispute resolution process itself. Even if there is no blanket exception to the exhaustion requirement for retirees, cases involving retirees will frequently raise difficult issues under other, generally applicable exceptions to the exhaustion requirement. Retiree cases will frequently raise issues as to whether the contractual remedy covers retirees, particularly where, as in this case, the contractual remedy is limited to employee grievances. A party can be required to exhaust only if the contractual remedy covers the dispute at issue. *UAW Local No. 125 v. IT & T Corp.*, 508 F.2d 1309, 1313 (8th Cir. 1975) ("[A] party cannot be required to submit to arbitration any dispute that he has not agreed to have arbitrated.") Further, retiree cases will frequently involve an issue as to whether the contractual remedy is available to retirees. In this case, this issue could be raised on two grounds. First, it could be argued that the contractual remedy is not available to retirees because it involves management personnel, such as foreman, who are not readily available to retirees. Second, it could be argued that the contractual remedy is not available to those retirees claiming rights under old collective bargaining agreements that contain grievance and arbitration procedures which have since been changed. Finally, retiree cases will frequently involve an issue as to whether exhaustion should be excused on the ground of futility due to the conflict of interest between retirees and active employees. *Cf. Trustees of Local 478 Trucking and Allied Industries Pension Fund v. Siemens Corp.*, 721 F.2d 451, 455 (3rd Cir. 1983). Given all these issues, retiree cases would frequently require a mini-trial in federal court to determine whether exhaustion is required. This would defeat one of the purposes of the exhaustion requirement: providing an expeditious remedy. *See Boys Markets, Inc. v. Retail Clerks Union, Local 770,* 398 U.S. 235, 249, 90 S.Ct. 1583, 1591, 26 L.Ed.2d 199 (1970). It would certainly be more expeditious to recognize a blanket exception from the exhaustion requirement for retirees.

Defendants' final argument is that the collective bargaining agreements and insurance agreements require plaintiffs to exhaust the contractual remedies even if the union owes them no duty. As this court noted in *Robbins*, the exhaustion requirement is fundamentally a matter of contract. As a general rule, exhaustion is required or not required as the parties have agreed in the collective bargaining agreement. *Robbins*, 700 F.2d at 442. The parties to a collective bargaining agreement could provide that retirees must exhaust contractual remedies controlled by the union before suing the employer. However, absent a union duty of fair representation to retirees, such a requirement would amount to a provision that the union and the employer have absolute control over retiree benefits at all times. Due to the drastic effect of an exhaustion requirement on retirees, a contractual exhaustion requirement will be found only where it is provided in express words that retirees must exhaust contractual remedies before suing the employer. *See Robbins*, 700 F.2d at 442.

There is no such express provision in this case. Prior to 1973 the only provision submitting any dispute to the grievance and arbitration procedure was the grievance and arbitration provision itself. The grievance and arbitration provision merely provided, "When an employee has a grievance he shall...." This does not expressly require exhaustion. Further, this provision does not expressly refer to retirees. Indeed, the language "when an employee has a grievance" suggests that the grievance and arbitration procedure is limited to active employees. This suggestion is supported by the structure of the grievance procedure which includes grievances to "his foreman" and the Plant Manager. After 1973, the insurance agreements provided that any insurance dispute would be subject to the grievance procedure in the collective bargaining agreement, beginning with step 2. This provision does not expressly require exhaustion. If the insurance agreements covered only retirees, this reference to the grievance procedure in the insurance agreements would be, in effect, an express reference to retirees. However, both active

employees and retirees were covered by the insurance agreements, and the insurance agreements' references to the grievance procedure do not expressly cover retirees. The references to the grievance procedure in the insurance agreements may have been intended to provide only that insurance disputes would be subject to the grievance procedure if otherwise within the grievance procedure, that is, if they constituted grievances by active employees. Finally, the 1978 summary plan description of the insurance plan calls into question whether the parties intended to require exhaustion of the grievance and arbitration procedures in the case of insurance disputes. The summary plan description provided alternative procedures to appeal the denial of a claim: the grievance procedure or a written appeal filed with Alpha's personnel department. Under this provision, the grievance procedure is not an exclusive remedy for insurance disputes, and exhaustion is required only where contractual remedies are exclusive. *Vaca v. Sipes,* 386 U.S. at 184 n. 9, 87 S.Ct. at 913 n. 9. Given the ambiguities as to whether the parties intended to require exhaustion of contractual remedies in the case of retiree insurance disputes, we should not require exhaustion on the ground that the parties required it.

III. CONCLUSION

The district court's grant of summary judgment is reversed and the case is remanded for further proceedings on the merits.

JOHN R. GIBSON, Circuit Judge, concurring.

I concur in the majority opinion, in part because I believe that *Robbins v. Prosser's Moving & Storage Co.,* 700 F.2d 433 (8th Cir. 1983), a decision of this court sitting en banc, compels that I do so. I joined Judge Henley's dissent in *Robbins,* and am aware that the Supreme Court has granted certiorari in *Robbins.* Any further instruction from the decision of the Supreme Court can be considered by the district court upon the remand we are ordering.

BRIGHT, Circuit Judge, dissenting.

I dissent.

The parties to the collective bargaining agreement and insurance agreement at issue specifically contracted to submit disputes to a grievance and arbitration procedure. Absent some exception to the general rule, employees claiming rights under the collective bargaining agreement must first exhaust exclusive remedies provided in the agreement. *See Clayton v. Automobile Workers,* 451 U.S. 679, 681, 101 S.Ct. 2088, 2091, 68 L.Ed.2d 538 (1981). The majority opinion excepts plaintiffs from the exhaustion requirement because, as retirees, the union owes them no duty of fair representation. Although an exception to the exhaustion requirement may sometimes exist when retirees claim rights under the collective bargaining agreement, *see, e.g., Robbins v. Prosser's Moving & Storage Co.,* 700 F.2d 433 (8th Cir.) (en banc), *cert. granted,* ____ U.S. ____, 104 S.Ct. 66, 78 L.Ed.2d 81 (1983),[1] I do not believe the exception extends to this case.

Although unions do not have a statutory duty to represent retirees in negotiating a new collective bargaining agreement, they may negotiate for benefits for retirees as a permissive subject of bargaining. *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass,* 404 U.S. 157, 181 n. 20, 92 S.Ct. at 398 n. 20 (1971). In the 1978 collective bargaining agreement, the union bargained for retirees to receive health benefits and life insurance. As part of the agreement, the parties specifically contracted to resolve disputes through a grievance and arbitration procedure. Because the union bargained for benefits for retirees and specifically agreed to submit disputes to the arbitration process, it has a legitimate interest in representing the retirees in arbitration. *Cf. United Steelworkers of America v. Canron, Inc.,* 580 F.2d 77, 80-81 (3d Cir. 1978).

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[1] The author of this dissent joined the majority in *Robbins.*

The facts of this case can be distinguished from this court's recent decision in *Robbins v. Prosser's Moving & Storage Co., supra,* 700 F.2d at 433, a case relied upon by the majority. Although the *Robbins* court held that pension fund trustees were not bound by the arbitration process because the union owed retirees no duty of fair representation, it limited the reach of its decision, stating,

> Certainly it is true that arbitration, pension funds, and health and welfare funds, are all matters of contract. They either exist or not as the parties have agreed in the collective-bargaining contract and related documents. If the agreements in the cases before us provided in express words that trustees' claims could not come to court before questions of contract interpretation had been settled by arbitration, this would be quite a different case. *Id.* at 442.[2]

The collective bargaining agreement in the present case does provide for a mandatory grievance and arbitration process to resolve disputes,[3] and the insurance agreement at issue expressly provides,

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[2] The agreement in *Robbins* provided,

> [the] Trustees shall take such steps, including *institution and prosecution of,* and intervention in, any *legal proceedings* that the Trustees in their discretion deem in the best interest of the fund to effectuate the collection or preservation of contributions or other amounts which *may be* owed to the trust fund, without prejudice, however, to the rights of the Union to take whatever steps which may be deemed necessary for such purposes. 700 F.2d at 442 (emphasis supplied).

[3] The collective bargaining agreement in this case provides,

> If an agreement cannot be reached in this manner, the matter may by mutual agreement be submitted to arbitration in such manner as shall be acceptable to both parties.

Despite the permissive "may" in the clause, this court has held that arbitration clauses of this nature are mandatory. *See Bonnot v. Congress of Independent Unions,* 331 F.2d 355, 359-60 (8th Cir. 1964) (permissive "may" in arbitration clause merely allows aggrieved party choice of pursuing or abandoning claim).

> Any difference arising under this Program respecting the administration, determination and/or implementation of the Program shall be subject to the grievance procedure established in the Basic Agreement***.

Thus, unlike the union in *Robbins,* the union in this case expressly contracted to arbitrate disputes arising under the agreement.

In exempting the plaintiffs from the exhaustion requirement, the majority also relies upon *Allied Chemical Workers, supra,* and *Robbins, supra,* for the proposition that retirees may bypass arbitration procedures when the union owes them no duty of fair representation. In those cases, however, the courts focused in part upon a potential conflict between the interests of retirees and the active employees as a basis for their decisions. The Supreme Court in *Allied Chemical Workers, supra,* stated,

> [T]he risk cannot be overlooked that union representatives on occasion might see fit to bargain for improved wages or other conditions favoring active employees at the expense of retirees' benefits. 404 U.S. at 173, 92 S.Ct. at 394.

See also Robbins, supra, 700 F.2d at 442.

In this case, however, no potential conflict exists between the interests of retirees and active employees. Alpha Portland Industries has closed all its cement plants and no longer employs any workers. With the potential conflict between retirees and active employees removed, the argument that the union will not live up to its contractual obligation to represent the retirees in arbitration carries no weight.

The district court properly determined that the retirees had failed to exhaust their contractual remedies. Accordingly, I would affirm the district court conditioned upon the district court's retaining jurisdiction in the event that arbitration procedures cannot be carried out. This reservation reflects some question in the record whether arbitration can proceed without the existence of local unions to represent the retirees, and is a question best left to the district court to decide.

APPENDIX C

Robert Anderson, Jr., et al.,
Appellants,

v.

Alpha Portland Industries, Inc., et al.,
Appellees.

No. 83-1358

UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT

Submitted Sept. 11, 1984.

Decided Jan. 16, 1985.

Before LAY, Chief Judge, HEANEY, BRIGHT, ROSS, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG and BOWMAN, Circuit Judges, En Banc.

JOHN R. GIBSON, Circuit Judge.

The issue before the court en banc is whether retired employees of Alpha Portland Industries, Inc., must exhaust grievance procedures before making claims for insurance benefits under a plan provided for in the collective bargaining agreements in effect when they retired. The district court required exhaustion, 558 F.Supp. 913 (E.D.Mo. 1982), but a panel of this court reversed. 727 F.2d 177 (8th Cir. 1984). We granted rehearing en banc, and we reverse the district court.

The appellants, plaintiffs below, are retired employees of an Alpha cement plant in St. Louis. They worked under collective bargaining agreements, negotiated by the United Cement, Lime and Gypsum Workers, which provided life and health insurance

for active and retired employees through reference to a group insurance program embodied in a separate agreement. The appellants had all retired prior to December 1981 when, because of financial problems, Alpha closed its St. Louis cement plant (Alpha sold its last cement plant in September 1982 and no longer operates any such plants). The local union was then dissolved, and shortly thereafter Alpha announced it was terminating insurance benefits for retirees. Plaintiffs brought this action under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1982), and section 502 of the Employee Retirement Income Security Act (ERISA), *id.* § 1132, claiming the right to lifetime insurance benefits under the agreements in effect when they retired.

The insurance plan since 1973 essentially had provided that "[a]ny difference arising under this Program respecting the administration, determination and/or implementation of the Program shall be subject to the grievance procedure established in the [collective bargaining agreement] beginning with Step 2 of such procedure."[1] A summary description of the insurance plan, however, distributed by Alpha to employees and retirees effective May 1, 1978, stated that an appeal from a denial of insurance benefits could be made through the grievance procedure *or* by filing a written complaint with the personnel department.

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[1] The district court apparently looked to this language in holding that the contracts were "clear and unambiguous in establishing a binding method of dispute resolution." 558 F.Supp. at 916. This approach, however, presumes Alpha's underlying argument that retiree rights continued to be subject to change with each new collective bargaining agreement. If, as plaintiffs contend, benefits vested upon retirement, those individuals leaving the company before 1973 might not be bound by this subsequently added language "clearly and unambiguously" mandating exhaustion of the grievance procedure. Since, however, our interpretation of the most recent contract differs from that of the district court, it is unnecessary for us to examine also the language of earlier less-explicit contracts.

The grievance procedure provided as follows:

> All employees shall at all times make an effort to perform their duties in such manner as to promote the efficient operation of their department and the plant as a whole. When an employee has a grievance, he shall * * * make an effort to arrive at a satisfactory settlement with his foreman. Failing to do so, he or his representative may take the matter up with the Plant Manager. Should these representatives of the Company and the individual employee or his representative fail to agree, the matter shall then be submitted in writing to the Manager of Industrial Relations of the Company. After full consideration and such conferences as may be mutually agreed upon with a representative of the International Union of Cement, Lime and Gypsum Workers, the matter shall be considered settled when the employee's and the Company's representatives have reached an agreement.
>
> * * * * * *
>
> If an agreement cannot be reached in this manner, the matter may by mutual agreement be submitted to arbitration in such manner as shall be acceptable to both parties. The decision of an impartial arbitrator shall be final and binding upon both parties.

The district court entered summary judgment in favor of Alpha on the basis that the retirees' suit was barred by their failure to exhaust this contractual remedy.

Our approach is governed by the recent Supreme Court decision in *Schneider Moving & Storage Co. v. Robbins,* ____ U.S. ____, 104 S.Ct. 1844, 80 L.Ed.2d 366 (1984). In *Schneider,* trustees of two multiemployer employee-benefit trust funds brought an action to enforce contribution and audit provisions

against certain participating companies. The district court dismissed the suit pending exhaustion of remedies under the relevant collective bargaining agreements, but the Supreme Court reversed. In reaching its conclusion, the Supreme Court first rejected the applicability of a presumption in favor of arbitrability and then found that there was no express contractual language requiring, nor any indication of intent by the parties to require, exhaustion in regard to trustee claims relating to the fund. Thus, proceeding likewise, we look first to whether there is a presumption in favor of arbitrability as to grievances of retirees and then address the issues of contractual interpretation.[2]

I.

The Supreme Court has held that, in light of national labor policy, contracts between unions and employers should be interpreted with a presumption in favor of requiring arbitration. *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960). Alpha argues that this presumption should extend to this case and that *Schneider* is distinguishable in that it dealt not with retirees but with trustees "outside the collective bargaining

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[2] We recognize that the obligation to invoke grievance procedures is a matter of contract. *Schneider,* 104 S.Ct. at 1847 n. 5 (quoting *Robbins v. Prosser's Moving & Storage Co.*, 700 F.2d 433, 442 (8th Cir.1983)); *Atkinson v. Sinclair Ref. Co.*, 370 U.S. 238, 241, 82 S.Ct. 1318, 1320, 8 L.Ed.2d 462 (1962). In *Delaney v. Union Carbide Corp.*, 749 F.2d 17 at 19 (8th Cir.1984), however, we distinguished *Schneider* as being a case in which "there was no clear agreement for the submission to arbitration of disputes" between trustees and employers. *Schneider,* rather than *Delaney,* controls here for that reason. *See infra* section II.

relationship."[3] Alpha, however, then proceeds without discussion to cite cases and quote language in a fashion so as to equate retirees with "employees" and "the union." We cannot agree that *Schneider* divides the world of labor plaintiffs into "trustees" and "non-trustees" with the presumption of arbitrability applying to all but the former; the issue instead is whether the retirees here are more similarly situated with the trustees in *Schneider* or with active employees and their unions as to whom arbitration generally has been required.

The Supreme Court in *Allied Chemical & Alkali Workers Local No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 172, 92 S.Ct. 383, 394, 30 L.Ed.2d 341 (1971), held that retirees are not "employees" within the meaning of the National Labor Relations Act, 29 U.S.C. §§ 151-168 (1982), and cannot properly be joined with active employees in a collective bargaining unit.

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[3] Alpha offers two additional grounds for distinction that merit little discussion. First, it argues that *Schneider* involved interpretation of a trust agreement rather than of a collective bargaining agreement as here. That, however, is not an accurate characterization of this dispute. The insurance plan is embodied in a separate contract and pursuant to ERISA is treated as a trust, with Alpha as a fiduciary, even if collectively bargained. *See In re Vorpahl*, 695 F.2d 318, 320-21 (8th Cir.1982). Furthermore, the Supreme Court in *Schneider* specifically stated that its rule as to trustee-employer disputes applies "even if those disputes raise questions of interpretation under the collective-bargaining agreements." 104 S.Ct. at 1849 (footnote omitted). Second, Alpha argues that *Schneider's* rejection of the presumption in favor of arbitrability does not extend to cases where, as here, there is no contract language giving plaintiffs the express right to resort directly to court. The Supreme Court, however, in the relevant passage of its opinion, does not mention this factor. *Id.* ERISA grants a statutory right to sue. 29 U.S.C. § 1132. To suggest that this legal right should be deemed waived in favor of mandatory arbitration if it is not made express in the contract reads back into *Schneider* the very presumption in favor of arbitrability that the Supreme Court rejected. In *Schneider* it is exhaustion of contractual remedies, not the right to sue, that must be express. *E.g., Schneider*, 104 S.Ct. at 1850.

Alpha seeks to avoid the import of this case by limiting it to the obligation to bargain on behalf of retirees, arguing that once a union chooses, as is still permissible, to so bargain, it then has an interest in enforcing the contract and thus the authority to represent retirees in grievance and arbitration proceedings. The cases Alpha cites, however, *e.g., United Steelworkers v. Canron, Inc.*, 580 F.2d 77, 80-81 (3d Cir.1978); *Textile Workers Local 129 v. Columbia Mills,* 471 F.Supp. 527, 530-31 (N.D.N.Y.1978), support only the proposition that a union has standing to assert retirees' rights under a collective bargaining agreement to which it is a party *if it chooses* and that an employer may not refuse to arbitrate its contractual obligations with the union. These cases do not establish that a union which does bargain for its retirees becomes their *exclusive* representative and that the retirees then *must* proceed through the union.[4] In contrast, the Sixth Circuit has held that retirees may settle a claim against the company under the collective bargaining agreement even while the union has a suit pending on the issue. *International Union, UAW v. Yard-Man, Inc.*, 716 F.2d 1476, 1484-85 (6th Cir.1983), *cert. denied,* ____ U.S. ____, 104 S.Ct. 1002, 79 L.Ed.2d 234 (1984).

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[4] Alpha at one point argues that the duty to represent individuals in grievance procedures arises from contract and cites this passage from a footnote in *Bowen v. U.S. Postal Serv.*, 459 U.S. 212, 225 n. 14, 103 S.Ct. 588, 596 n. 14, 74 L.Ed.2d 402 (1983): "When the collective-bargaining agreement provides the union with sole authority to press an employee's grievance, the union acts as the employee's exclusive representative in the grievance-arbitration procedure." The opening clause quoted, plus earlier language in the footnote, make clear that this exclusive representative status follows only when the contract establishes the grievance procedure as an exclusive remedy so that individual workers may no longer deal directly with the company. This argument thus presumes the issue—the proper interpretation of the contract—to be determined here. *Cf. Schneider,* 104 S.Ct. at 1851 n. 22.

Alpha cites *Republic Steel Corp. v. Maddox,* 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965), as supporting its argument that individuals who are no longer members of the collective bargaining unit may still be required to invoke contract grievance procedures to settle disputes with the company. *Republic Steel,* however, involved a worker who had been laid off and was seeking severance pay under the collective bargaining agreement. The Supreme Court, in holding that that situation was not sufficiently different from grievances in general to justify an exception to the exhaustion requirement, said that use of contractual remedies would "complement[] the union's status as *exclusive* bargaining representative." *Id.* at 653, 85 S.Ct. at 616 (emphasis added). The Court found that issues concerning severance could have a significant effect on future union-company relations and could "inhibit" negotiations on subsequent collective bargaining agreements. *Id.* at 656, 85 S.Ct. at 618.

Allied Chemical, however, does answer both of these contentions.[5] A union, the Supreme Court held, is not the *exclusive* bargaining representative for retirees even when, as there, the insurance benefits modified by the company originally had been established through collective bargaining: The company did not commit an unfair labor practice by directly contacting retirees and proposing changes in the health plan. 404 U.S. at 183-88, 92 S.Ct. at 399-02.

The Supreme Court in *Allied Chemical* also found a union's interest in retirement benefits, unlike its interest in the severance provisions in *Republic Steel,* much more "speculative" because present employees would have no assurances that they were advancing their own interests by advancing pensioners' interests.

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[5] The Supreme Court in *Allied Chemical* specifically distinguished individuals who, while not presently "employees" for some reason, were active members of the work force available for hire from individuals who had ceased work with no expectation of any further employment. 404 U.S. at 168, 92 S.Ct. at 392.

They would have no guarantee of similar representation when they retired because active workers would not be bound to continue to bargain for retiree rights and could give up such rights and benefits in favor of more immediate interests. *Id.* at 181-82, 92 S.Ct. at 398-99. *Cf. Republic Steel,* 379 U.S. at 656, 85 S.Ct. at 618.[6]

Alpha responds that reconciling such conflicting interests of different groups of employees is exactly the province of a union. It relies on, among other precedents, *Humphrey v. Moore,* 375 U.S. 335, 349-50, 84 S.Ct. 363, 371-72, 11 L.Ed.2d 370 (1964); *Ford Motor Co. v. Huffman,* 345 U.S. 330, 337-39, 73 S.Ct. 681, 685-86, 97 L.Ed. 1048 (1953); and *Buchholtz v. Swift & Co.,* 609 F.2d 317, 328 (8th Cir. 1979) (Heaney & Bright, JJ., concurring in denial of rehearing en banc), *cert. denied,* 444 U.S. 1018, 100 S.Ct. 672, 62 L.Ed.2d 648 (1980). These cases, however, involve varying priorities among active employees who, despite differences, had been found to have sufficiently similar interests to make them an "appropriate bargaining unit" in the contemplation of the National Labor Relations Act. In contrast, the Supreme Court in *Allied Chemical* held that retirees and active employees lacked the necessary "mutuality" or "community" of interests necessary to "assure the coherence among employees necessary for efficient collective bargaining and at the same time prevent a functionally distinct minority group of employees from being submerged." 404 U.S. at 172-73, 92 S.Ct. at 394. The cases cited by Alpha do not justify letting a union mediate the interests of a "functionally distinct minority" which cannot be made part of the bargain-

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[6] The Supreme Court on several occasions has acknowledged congressional concerns with ensuring that trust funds are managed in the interests of beneficiaries and not directed to the purposes of either union or management. *See United Mine Workers Health & Retirement Funds v. Robinson,* 455 U.S. 562, 571-72, 102 S.Ct. 1226, 1232, 71 L.Ed.2d 419 (1982); *NLRB v. Amax Coal Co.,* 453 U.S. 322, 331, 333-34, 101 S.Ct. 2789, 2795, 2796, 69 L.Ed.2d 672 (1981).

ing unit and which, as the Supreme Court pointed out, does not have a vote in union affairs. *Id.* at 175, 92 S.Ct. at 395.[7]

Finally, the Supreme Court holding in *Allied Chemical* that retiree benefits are only permissive and not mandatory topics for bargaining, 404 U.S. at 187, 92 S.Ct. at 401, eliminates concerns with inhibition of negotiations and with economic warfare. Retirees have no recourse to economic weapons other than a hope that active employees will strike in their behalf, a hope that was also available to the trustees in *Schneider,* who were similarly seeking to protect future interests of present employees and to enforce a contract to which the union was a party. The Supreme Court there, however, held this to be "no recourse." 104 S.Ct. at 1849. We must conclude that retirees are more similarly situated with trustees than with active employees and are equally "outside the collective bargaining relationship.[8] A presumption in favor of arbitrability again

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[7] The existence of an actual conflict between the union and the retirees here, argued by the parties in debating whether exhaustion otherwise required should be excused, is not relevant in the context of determining whether the presumption of arbitrability is even applicable or in interpreting the contract on that point. *Allied Chemical* clearly deals with the high probability of conflict in general making it improper for retirees and active employees ever to be joined in a collective bargaining unit, without regard to the specific circumstances. Furthermore, the demise of Alpha's cement plant and resulting dissolution of the unit of active employees cannot influence the meaning of a contract, written when the business was operating, as to whether retirees must exhaust contractual remedies in the collective bargaining agreement.

[8] "[T]he relationship of retiree and employer is unadorned with those special considerations peculiar to the relationship between an active employee, his union and the employer" since disputes will not affect the terms and conditions of employment as to which collective bargaining is mandatory and since retiree claims generally will rest on vested contractual rights as to which the "common strength" of a union is not needed for enforcement. *International Union, UAW v. Yard-Man, Inc.,* 716 F.2d 1476, 1485 (6th Cir. 1983), *cert. denied,* ____ U.S. ____, 104 S.Ct. 1002, 79 L.Ed.2d 234 (1984).

would further the "national labor policy of peaceful resolution of labor disputes***only indirectly, if at all." *Id.* The presumption then likewise is "not a proper rule of construction in determining whether arbitration agreements between the union and the employer apply to disputes between [retirees] and employers, even if those disputes raise questions of interpretation under the collective-bargaining agreements." *Id.*[9]

II.

Unaided by such a presumption, the contract language here cannot be read as requiring exhaustion of grievance procedures by retirees. As in *Schneider,* the relevant provisions address only grievances of "employees" and speak only of "employees" initiating the contractual dispute resolution procedures.[10] For much the same reasons as cause us to reject applicability of a presumption in favor of arbitrability, we also "will not engage the unlikely inferences that the parties to [this] agreement[ ] intended to require [retirees] to rely on the Union" to handle their

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[9] Such a presumption may have been expressed in our earlier panel opinion, *Anderson,* 727 F.2d at 180, *but see id.* at 184-85, and would have been consistent with the position taken by other circuits. *E.g., Challenger v. Local Union No. 1, Int'l Bridge, Structural & Ornamental Ironworkers,* 619 F.2d 645, 647 (7th Cir. 1980); *Amato v. Bernard,* 618 F.2d 559, 567 (9th Cir. 1980). All of those cases, however, were decided without the guidance of the Supreme Court's opinion in *Schneider.* We believe *Schneider* compels both the analysis and the result that we express here.

[10] The arbitration clause in *Schneider* was to apply "should differences arise between the Company and the Union or any employee of the Company." *See Robbins v. Prosser's Moving & Storage Co.,* 700 F.2d 433, 442 n. 8 (8th Cir. 1983), *aff'd sub nom. Schneider Moving & Storage Co. v. Robbins,* ____ U.S. ____, 104 S.Ct. 1844, 80 L.Ed.2d 366 (1984).

grievances. *Schneider,* 104 S.Ct. at 1851; *see id.* at 1850-51.[11] Furthermore, the context in which the grievance procedure is presented in the Alpha-Union contract makes any construction applying it to retirees even more strained. The article entitled "Handling of Complaints" begins, "All employees shall at all times make an effort to perform their duties in such manner as to promote the efficient operation of their department and the plant as a whole. When an employee has a grievance, he shall ...." The initial steps in the grievance procedure (only the first of which is to be skipped for insurance claims) all involve taking complaints to a foreman or plant manager, individuals not convenient to retirees, who do not even have a "workplace." *Cf. Friedrich v. Local No. 780, International Union of Electrical, Radio & Machine Workers,* 515 F.2d 225, 228 (5th Cir. 1975) (machinery of grievance procedure "clearly oriented exclusively toward employee initiated disputes' as opposed to complaints raised by the company); *Affiliated Food Distributors v. Local Union No. 229, International Brotherhood of Teamsters,* 483 F.2d 418, 421 (3d Cir. 1973) (collective bargaining agreement not susceptible to a "fair construction" that it covered company-initiated grievances when grievance procedure would require company to refer its complaint to a union steward who would then present it back to a company official), *cert. denied,* 415 U.S. 916, 94 S.Ct. 1412, 39 L.Ed.2d 470 (1974).

The only language bearing on the necessity of exhaustion present in this instance but absent in *Schneider* is the clause in the insurance plan making claims thereunder "subject to" the

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[11] In our panel opinion we underscored the inherent conflicts in relegating retirees to an exclusive remedy of arbitration controlled by a union which owes them no duty of fair representation. 727 F.2d at 183; *see also Robbins v. Prosser's Moving & Storage Co.,* 700 F.2d 433, 442 (8th Cir. 1983), *aff'd sub nom. Schneider Moving & Storage Co. v. Robbins,* ____ U.S. ____, 104 S.Ct. 1844, 80 L.Ed.2d 366 (1984).

grievance procedure in the collective bargaining agreement. This clause, however, does not expressly refer to exhaustion for *retirees* and need not be read as so expanding the scope of the grievance procedure. The "subject to" language instead merely directs all persons covered by the insurance plan, employees and retirees alike, to the separate collective bargaining agreement for use of the grievance procedure *if otherwise applicable. See Anderson,* 727 F.2d at 185. As we have discussed, the grievance procedure is not applicable to retirees.

In addition, any implication that exhaustion is mandatory as to retirees is undermined by the reference in the summary plan description to filing of a written complaint as an alternate means of challenging a denial of insurance benefits. Alpha argues that this language can be given no effect because the terms of the insurance plan are controlling and the summary description cannot add to a beneficiary's rights. The case which Alpha cites in support of this position, however, *O'Brien v. Sperry Univac,* 458 F.Supp. 1179 (D.D.C. 1978), held only that there is no federal *jurisdiction* under 29 U.S.C. § 1132 when a claim arises under the summary description rather than under the insurance plan itself.[12] In a footnote, in fact, the court specifically preserved the question of whether plaintiffs might be entitled to some relief "under the terms of the summary plan description." *Id.* at 1180 n. 1. In any event, we are using the summary description not to add to the terms of the insurance plan but to illuminate the meaning and the intent of the parties when they crafted the "subject to" language, as discussed above. We find no justification for inferring that the reference to the grievance procedure is mandatory for retirees in light of the language and structure of the grievance procedure itself, *see*

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[12] This holding has been rejected in other circuits. *E.g. Gors v. Venoy Palmer Mkt.,* 578 F.Supp. 365, 368 (E.D. Mich. 1984).

Schneider, 104 S.Ct. at 1850, and evidence of contemplation of alternate avenues of appeal.[13]

Our conclusion that the language of the contract does not mandate exhaustion of the grievance procedure is in no way altered by *Bonnot v. Congress of Independent Unions Local No. 14,* 331 F.2d 355 (8th Cir. 1964). The Alpha contract provides that, as the last step of the grievance procedure, the dispute "may by mutual agreement" be submitted to arbitration. In *Bonnet* we held that in certain circumstances the term "may" merely allows that an employee may choose not to pursue his grievance but that if he does pursue it, he must seek arbitration. *Id.* at 359. Assuming that the Alpha contract were susceptible to this interpretation, the resulting mandatory arbitration provision still would apply only to individuals who

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[13] Alpha also cites *Van Orman v. American Ins. Co.,* 680 F.2d 301 (3d Cir. 1982), for the proposition that the insurance plan alone contains the beneficiaries' rights and may not be altered by the summary description. The disclaimer accompanying the summary description in that case, however, was quite strong: "Complete details of the Plan are contained only in the Company's Revised Retirement Plan Dated April 1, 1957, which instrument governs the Plan* * *. All statements in the foregoing outline and explanations are qualified by reference to the Plan itself." *Id.* at 304. In contrast, Alpha qualifies its summary description only by stating that:

> [t]he purpose of this summary is to describe the Plan to you in nontechnical terms. It is intended to give you enough information to answer most of the questions you are likely to have. However, if we covered every detail of the Plan, it would no longer be a summary, but as technical as the full text itself; so if you have a specific question you should consult the Plan document.

To find that the Alpha insurance plan, even if it embodies all beneficiary rights, is not a total integration as to remedies would seem consistent with the purposes of 29 U.S.C. § 1022 (1982), which requires that the summary plan description include accurate information on the remedies available when insurance claims are denied. *See* H.R.Rep. No. 533, 93d Cong., 1st Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4649; S.Rep. No. 127, 93d Cong., 1st Sess., *reprinted in* 1974 U.S.Code Cong. & Ad. News 4838, 4847.

were required to use the grievance procedure in the first place. Here, we have held that the language of the contracts does not require that retirees even initiate the grievance procedure, let alone reach the last step of arbitration. *Bonnot* has little bearing on our issue.

Congress in enacting ERISA declared a policy of protecting employee benefit plan participants by providing "ready access to the federal courts." 29 U.S.C. § 1001(b) (1982). Furthermore, there are strong practical reasons for allowing retirees to bring ERISA suits without first exhausting contractual remedies. The expertise of arbitrators is in the "law of the shop, not the law of the land," i.e., trusts, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57, 94 S.Ct. 1011, 1024, 39 L.Ed.2d 147 (1974), and arbitration might not result in a final decision. *Alexander, supra; cf. Clayton v. International Union, UAW*, 451 U.S. 679, 691-93, 101 S.Ct. 2088, 2096-97, 68 L.Ed.2d 538 (1981) (exhaustion of internal union remedies not required when member could not obtain relief sought). Finally, question might be raised as to whether mandatory arbitration would meet statutory requirements as to opportunities for fiduciary review of denials of benefit claims. 29 U.S.C. § 1133 (1982).

We find that the insurance plan here does not, through either express language, intent or presumption, require exhaustion of contractual remedies by retirees seeking disputed benefits. We thus reverse the grant of summary judgment in favor of Alpha. The retirees are entitled to pursue their claims in federal court.

BRIGHT, Circuit Judge, dissenting.

Previously, I filed a dissent to the panel opinion in this case, *Anderson v. Alpha Portland Industries, Inc.*, 727 F.2d 177, 185-187 (8th Cir. 1984), and I adhere to that dissent.

The panel's opinion relied in part on *Robbins v. Prosser's Moving & Storage Co.*, 700 F.2d 433 (8th Cir. 1983) (en banc) to

support its determination that a union owes no duty of fair representation to retirees. I disagree because that opinion did not take cognizance of the limited scope of our holding in *Robbins.* In *Robbins,* we recognize that under certain circumstances, a union might be required to arbitrate on behalf of the trustees of various health and welfare funds. We stated:

> Certainly it is true that arbitration, pension funds, and health and welfare funds, are all matters of contract. They either exist or not as the parties have agreed in the collective-bargaining contract and related documents. If the agreements in the cases before us provided in express words that trustees' claims could not come to court before questions of contract interpretation had been settled by arbitration, this would be quite a different case.

Id. at 442.

The Supreme Court granted certiorari in *Robbins* and affirmed the judgment of this court. *Schneider Moving & Storage Co. v. Robbins,* ____ U.S. ____, 104 S.Ct. 1844, 80 L.Ed.2d 366 (1984). I believe the Court's opinion preserves the limited nature of our holding in *Robbins.* The Court stated:

> There simply is no evidence that the Union owes any statutory or *contractual duty* of fair representation to the trustees. In the absence of such evidence, we will not engage the unlikely inference that the parties to these agreements intended to require the trustees to rely on the Union to arbitrate their disputes with the Employer. (Emphasis added) (footnotes omitted).

Id. at 1851.

In the instant case, as I have previously observed, the insurance agreements provide for arbitration by explicit language: "Any difference arising under this Program respecting the administration, determination and/or implementatioin of the Program shall be subject to the grievance procedure established in

the Basic Agreement * * *." Thus, I think the district court properly determined that the retirees had failed to exhaust their contractual remedies.

I would affirm the district court, subject to the district court retaining jurisdiction in the event arbitration procedures cannot be carried out because of the closing of the cement plant and the dissolution of the local union.

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No. 84-1547

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALPHA PORTLAND INDUSTRIES, INC., etc., et al
Petitioners,

vs.

ROBERT ANDERSON, JR., et al,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED

1. In ERISA actions for repudiation of vested insurance benefits under ERISA benefits plan, are retirees bound to exhaust using a grievance and arbitration procedure contained in a separate collective bargaining agreement and specifically limited by employer and union to use and invocation solely by employees?

2. Pursuant to ERISA disclosure requirements, 29 U.S.C. §1022, are ERISA plan and ERISA plan sponsor bound by review procedures and statements made by them in Congressionally-mandated summary plan description?

3. Are retirees who are wrongfully denied ERISA plan benefits, improperly deprived of their right to full and fair review by a fiduciary mandated by ERISA Section 503, 29 U.S.C. §1133, by the district court's dismissal for retirees' failure to arbitrate under employer-union agreement when (a) grievance procedure always limited use and invocation of such procedures solely by statutory employees, (b) retirees' former recognized collective bargaining representative (local union) had long been dissolved, (c) after plan repudiation by petitioners, employer put national union under duress to enter into what petitioners call a forfeiture-of-vested-retirement-benefits agreement, and (c) national union had never agreed to arbitrate for retirees and refused to arbitrate for retirees, putting them "on their own"?

4. Do Steelworker arbitration trilogy presumptions attach to dispute over petitioners' repudiation of vested insurance benefits given to retirees for life under terms of ERISA benefits plan unilaterally created by employer and at times, from time to time thereafter, subjected to collective bargaining by local union recognized by employer to be representative only for NLRA Section 9 employees and not bargaining spokesman for retirees?

5. Where contractual arbitration procedure in local union collective bargaining agreement permits arbitration only as to such matters and using such procedures as local union and employer shall agree upon, and retirees' former collective bargaining representative (local union) had been dissolved with earlier plant closing, and no procedures exist for selection of arbitrator, may employer and plan use the defense of failure of contract arbitration exhaustion to oppose retirees' action for repudiation of vested insurance benefits provided in separate ERISA benefits plan?

6. Is arbitration of plan and plan sponsor's repudiation of benefit obligations to retirees, prohibited as a matter of law?

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Petitioners,

vs.

ROBERT ANDERSON, JR., et al,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

Petitioners Alpha Portland Industries, Inc. ("Alpha") and its Plan which Alpha administers, have asked this Court to grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered en banc January 16, 1985, and reported at 752 F.2d 1293. The Court of Appeals reversed the district court's dismissal and denied of both reconsideration and stay.[1] Because the decision of the appeals court is correct and raises no questions warranting review by this Court, respondents, all retirees of Alpha, respectfully urge this Court to deny the pending petition.

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[1] The Petition for Certiorari should be dismissed for failure of petitioners to include all decisions below. Petitioners included only one of the district court decisions from which appeal was taken to the court of appeals.

(cont. on next page)

STATEMENT OF THE CASE

Petitioners' "statement of the case" is inaccurate and at odds with the facts recited by the United States Court of Appeals for the Eighth Circuit.[2] Petitioners' statement also omits many pertinent facts. Therefore respondents deem it necessary to provide a separte statement of the case, as follows:

This action was instituted as a class action by respondents who are aged persons who have from time to time retired from their employment with petitioner Alpha, some retiring as far back as early 1960's. Upon retirement each received a pension and reassurance they and their spouses would continue to receive life and health insurance coverage for life as promised in the benefits plan Alpha unilaterally created in 1946 and improved from time to time as to employees who later retire. Effective

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Respondents (as dismissed plaintiffs in the district court) filed their notice of appeal appealing from not merely the order issued by the district court on November 12, 1982, which petitioners include in their appendix, but also from the further district court order and decision of March 4, 1983 denying stay, new trial or further consideration. A copy of that notice of appeal is in the appendix, page A-1.

The concluding remarks in the district court decision petitioners exclude, reveals an inhospitability by the district judge to ERISA beneficiaries and to ERISA purposes, and a deliberate record bias by the district court for petitioners. The district court even denounced respondents' bringing the recent Eighth Circuit decision in *Robbins v. Prosser Moving & Storage Co.*, 700 F.2d 443 (1983), affirmed sub nom *Schneider Moving & Storage Co. v. Robbins*, 80 L.Ed.2d 366 (1984), to his attention, conduct this Court allows as a matter of course. Supreme Court Rule 22.6. The United States Court of Appeals for the Eighth Circuit en banc, found that the district court prejudged the underlying merits issues for petitioners. 752 F.2d 1293, 1294 n.1.

[2] The United States Court of Appeals en banc was particularly critical of petitioners' statement repeated several times in its current petition that "certain collective bargaining agreements are the source of [respondents'] claims for a right to receive life insurance and medical benefits for the rest of their lives." See 752 F.2d at 1296 n.3. The source of respondents' claims is an ERISA benefits plan.

May 1, 1982 petitioners repudiated the lifetime insurance obligation provided by the benefits plan for all retirees at all presently operating and closed plants, affecting over 450 retirees and their dependents at nine former plants. The named repondents are all retirees from Alpha's now closed St. Louis plant.

Respondents sought remedies for petitioners' repudication of respondents' vested retirement life and health insurance benefits under the benefits plan. Contrary to petitioners' attribution of the collective bargaining agreement as the source of benefits, the Eighth Circuit en banc noted the source of respondents' claims for the continuation of vested insurance benefits was the separate ERISA benefits plan, 752 F.2d at 1296 n.3, which plan had been unilaterally created by Alpha and was always administered solely by Alpha and its agents (Equitable).

Plan origination did not result from collective bargaining. For many years the collective bargaining agreement made no reference whatsoever to the benefits plan, and at most times thereafter the reference was at best one in passing; that is, at times the collective bargaining agreement explicitly required plan improvement for active employees (and *future* retirees) only, and at times the local agreement was silent on the obligation of the employer for plan continuation. The plan and retiree benefits always continued. During the course of collective bargaining, even before this Court's decision in *Allied Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), but using the very same rationale, Alpha rejected local union efforts to bargain for increased benefits for persons who had already retired.

Several respondents had retired before the separate plan instrument was revised to include any language as to how benefits disputes might be resolved. 752 F.2d at 1294 n.1. The plan document never contained any internal grievance procedure. The plan document last existing refers to possible use of the

grievance procedure "in the Basic Agreement," but the Basic Agreement negotiated as a result of coordinated bargaining between a number of unions and Alpha, contained no grievance or arbitration procedures. The last extant collective bargaining agreement at the time of plant closing with resdpondents' local union, called a "Local Agreement" (and *not* "Basic Agreement"), limited its grievance procedure solely to use by employees. The grievance and arbitration procedure in the Local Agreement had never been used to arbitrate disputes involving retiree benefits under the plan.

Many respondents retired long before Alpha closed its St. Louis plant in December 1981, and all had retired by plant closing. When Alpha closed its St. Louis plant respondents' prior collective bargaining representative, a local union, was dissolved. The local union did not exist when petitioners later repudiated their plan obligations to retirees.

The Local Agreement provided that arbitration on any "employee" grievance may occur only if the local union and Alpha can at the time "mutually agree" on how the arbitrator is then to be selected, what will be the subjects for arbitration and only if they can also then agree on arbitration procedures. It was understood the union could strike if no agreement could be reached. Petitioners represented to the district court that there was an understood arbitration machinery dispensing with concern about any need for agreement, but on appeal petitioners acknowledged that such was not true. Petitioners suggested on appeal if the collective bargaining parties (Alpha and union) could not agree on the arbitrator's selection and what subjects they would agree to arbitrate or what procedures they were to agree upon, the same district judge who had already prejudged the matter, could select the arbitrator and impose his views on what a reasonable arbitration agreement would be.

When ERISA was enacted Alpha distributed a summary plan description to respondents pursuant to 29 U.S.C. §1022. The booklet confirmed that the retirees' insurance benefits con-

tinued "for life" and advised further that if there was any difference with respect to benefit matters, beneficiaries could use either the grievance procedure *or* use a separate procedure of direct appeal consistent with the procedures set out in ERISA Section 503, 29 U.S.C. §1133.

When petitioners announced their repudiation of respondents' vested benefits, since respondents' local union was then dissolved respondents asked the national union what could be done. They were told that the national union did not propose to help them, sympathetic as it was, that it did not represent retirees, that it never represented retirees in arbitration before and did not propose to do so then, and that the respondents where thus "on their own."

Unbeknownst to respondents, at that time Alpha made the subject of benefits for past retirees a mandatory subject of bargaining with the national union and two other (remaining) locals at Alpha's two Eastern plants then being sold. Alpha put those unions and what few remaining members they had at two Eastern plants, under tremendous offensive duress to force the national union and its remaining active employees still in Alpha's employ at Alpha's two last plants located elsewhere, to agree to "exclude" the vested life and health insurance benefits guaranteed under the benefits plan to those who had retired. Alpha further insisted before signing that agreement, that only those then-active employees at the two plants vote for the "exclusion," which vote took place without notification to respondents and other eligible retirees, leading to majority vote for "exclusion" and union concession to Alpha's "exclusion" agreement.

Within days of the union's "exclusion" concession then unknown to the retirees, respondents asked petitioners to pursue the review procedures set out in ERISA, 29 U.S.C. §1133, and as allowed to them in the summary plan description, which review procedures call for a full, fair review by a fiduciary using

fiduciary standards. Alpha did not then propose arbitration in response, but simply delayed response using the ninety days allowed by the Secretary's regulations promulgated under Section 503, to prepare for litigation. When Alpha did not announce any decision, upon expiration of the ninetieth day respondents commenced suit. They claimed rights separately under both the ERISA benefits plan and consistent with this Court's decision in *Allied Chemical Workers v. Pittsburgh Plate Glass Co.*, supra, 404 U.S. at 181 n.20, under the collective bargaining agreement, alleging however primary jurisdiction based on ERISA, 29 U.S.C. §1132.

During proceedings in the district court, petitioners advised that if the union were to arbitrate and win in an arbitration for the retirees, petitioners intended to hold the national union responsible in damages for petitioners failure to achieve the "benefits" from the "exclusion" agreement they had forced on the national union and its two remaining locals. Petitioners also told the district court they would judicially attack any adverse arbitration decision that attempted to go beyond the terms of the collective bargaining agreement, to prevent the arbitrator from considering petitioners' obligations under the terms of the separate ERISA group benefits plan or the meaning and applicability of the summary plan description expressly confirming to retirees that the plan language meant the retirees' insurance and health benefits were "for life."

By two decisions, only one of which petitioners include in their appendix, the district court found all respondents, no matter when retired, were subject to the most recent Basic and Local collective bargaining agreements which, without hearing, it found to be the source of any and all retiree rights. The district court demanded that Alpha be fully trusted and that respondents find a way to arbitrate through an unwilling national union who was never their collective bargaining representative and who executed the "exclusion" agreement. The district court held that the suit should be dismissed. The se-

cond district court opinion also found the lawsuit and respondents' arguments opposing arbitration and seeking 503 review procedures, frivolous. The district court threatened respondents with sanctions for suggesting arbitration in the least bit inappropriate. It denied a request for stay. The district judge even told respondents in that second decision that they should suffer and deserved to suffer for questioning the appropriateness of arbitration; he refused to even rule on respondents' request for preliminary relief.

On appeal taken by respondents, a panel of the Eighth Circuit reversed in January, 1984, 727 F.2d 177, finding arbitration inappropriate. Even the dissent would have reversed the denial of a stay and remanded for different reasons. The dissent, which was also the sole dissent en banc, would not so certainly trust Alpha and recognized problems were realistically present by reason of the respondents' local union's dissolution and the arbitration clause's requirement of mutual agreement on arbitrator selection and arbitration subjects and procedures each time a grievance arose. The dissent would allow the district judge to use his "discretion" to meet those problems.

Because the panel majority on appeal heavily relied upon the Eighth Circuit's decision en banc in *Robbins v. Prosser Moving & Storage Co.*, supra, which had then been accepted for review by this Court sub nom *Schneider Moving & Storage Co. v. Robbins*, 80 L.Ed.2d 366 (1984), at petitioners' request the appeals court granted rehearing en banc expressly to reconsider respondents' appeal after the decision of this Court in *Schneider*, supra. At the oral argument before this Court in *Schneider* both Mr. Yates as counsel for petitioner Schneider Moving & Storage Co. and Mr. Luplow as counsel for the respondent trustees, advised that clearly if this were a case involving the beneficiaries themselves, such as retirees, there would be no question but that such retired beneficiaries would not be subject to Schneider's arbitration defense. Mr. Yates attempted to suggest, however, that the trustees were not in as

protected a position as would be such persons as retirees seeking benefits. He insisted the trustee rely on the union. Mr. Luplow suggested, however, that the trustees should stand alike with such classes as retirees whose rights and interests the trustees sought to protect.

Following this Court's decision in *Schneider,* supra, the Eighth Circuit en banc reconsidered the panel decision, and by a vote of seven to one agreed with the prior panel majority. The court of appeals en banc held for any number of reasons that Alpha's arbitration defense was always improper. Among the reasons was that respondents sued under the terms of the plan for plan violation; that the plan internatlly contained no arbitration procedure; that the district court could not reject and erred to refuse to consider Congressional requirements for the full and fair review by a fiduciary, 29 U.S.C. §1133; that the summary plan description expressly confirmed an alternative review other than through representation by the union or use of the grievance procedure; that no union constituted any retirees' exclusive collective bargaining representative under fact or law; that the potentiality of conflict between the union and retirees was far too great to permit exclusive representation by the union; that the grievance procedure in the collective bargaining agreement was limited to use solely by Section 9 (29 U.S.C. §159) employees; and that the district court erred in making several prejudgments with respect to the merits of the litigation without allowing respondents to be heard. The court of appeals en banc also held that because of this Court's decision in *Allied Chemical Workers,* supra, and its recognition therein of the potentiality for conflict, it need not consider the meaning of the national union's conduct in rejecting the retirees' pleas for help and putting them "on their own" or the unions' entry into the "exclusion" agreement Alpha contended thereafter forfeited respondents' vested life insurance and health benefits guaranteed by the plan.

The Eighth Circuit also found that retirees' interests as plan beneficiaries are more aligned with those of the trustees than with those of active workers, and that like the trustees, retirees do not have the same economic resources or ability to disrupt industrial peace as to do active workers, and that the purposes behind the Steelworkers' arbitration trilogy, particularly the quid pro quo of arbitration in exchange for industrial strife, does not lend itself to claims of retirees who have no ability to strike or take other economic actions guaranteed by Congress to active employees by Section 7 of NLRA, 29 U.S.C. §157.

Although petitioners now state that the district court and the appeals court addressed the obligation of active employees to use the grievance procedure for their plan disputes, no court addressed this as an issue in the case. In fact the Eighth Circuit en banc left the question open. 752 F.2d at 1299-1300.

REASONS FOR DENYING THE WRIT

Summary of Argument

The facts and events are too complex to develop guidelines for any other case. A decision by this Court would have meaning only for the parties hereto.

If review were granted, petitioners would have this Court reverse and change the meaning of a number of cases previously decided by this Court. It would also require this Court to reject ERISA Sections 2(b) and 502, and to set aside Congressional demands for a review procedure mandated in ERISA Section 503.

The Eighth Circuit's decision fully and fairly comports with this Court's rationale in prior cases including *Schneider,* supra, and *Allied Chemical Workers,* supra.

I. Review Should Not Be Granted For The Facts Do Not Lend Themselves To The Establishment Of Any Meaningful Guidelines For Other Cases

Because of the complexity of the facts in this case, this is not a good case to provide guidelines for other cases to come. For example, the respondents' collective bargaining representative dissolved with plant closing. Respondents have no collective bargaining representative. Had the Court wanted to consider the collective bargaining representative's role vis-a-vis its own retirees, where the representative remained intact, *International Union, UAW v. Yard-Man, Inc.,* 716 F.2d 1476, 1485 (6th Cir. 1983), presented a better case, for the union there was not dissolved and it made every attempt to protect retiree rights rather than "exclude" them. Most unions would not do what Alpha said the national union and remaining active employees did here—"sell out" retirees' vested benefits to secure their own interests. This Court denied certiorari in *Yard-Man,* 79 L.Ed.2d 234 (1984).

In this case the benefit plan was unilaterally created by Alpha, not as the result of collective bargaining. Later collective bargaining agreements at times covered benefits for active employees and at times the agreement terms were silent, while the plan and plan obligations always continued and retirees always received their group insurance benefits whether there was any bargaining commitment or not. Since respondents' action was brought essentially for plan violation under ERISA, petitioners' search for guidelines on 301 breach-of-collective-bargaining-suits will be of little help.

Alpha's own summary plan description recognizes that the grievance-arbitration machinery is not mandatory, and provides an alternative method consistent with ERISA Section 503 guidelines, 29 U.S.C. §1133. A far better case for this Court to review the question whether a union or employer can restrict retirees to use of collective bargaining grievance machinery, should be presented by a case where there is no alternative procedure provided. Again *Yard-Man,* supra, would have allowed this issue to have been presented "clear" of alternatives. The alternative procedure in the instant case is clearly akin to the trust agreement's provision in *Schneider* that allowed the trustees to use methods of collection other than arbitration.

Another more compelling reason for this case not serving as a vehicle for guidelines, is the presence not merely of *Allied Chemical Workers'* "potential for conflict," but in fact actual conflict, the union putting retirees "on their own" when they asked for help and excluding retirees from notice or vote before entering into the "exclusion" agreement solely to protect active workers and to continue dues check-off. Petitioners exacerbated the conflict in this instance by warning the national union that a damage action is in the offing for Alpha's loss of "benefit" from the "exclusion" agreement should the national union agree to arbitrate, try and win the arbitration. Again, a case such as *Yard-Man,* supra, would have presented a far better factual instance, for there the union would not attempt to

sell out the interests of retirees; in fact the UAW wanted to protect its retirees and complained Yard-Man took advantage of them by not dealing with the union on benefits termination for retirees, a complaint that is justified if respondents were statutory employees that petitioners assert they are. *Medo Photo Supply Corp. v. NLRB,* 321 U.S. 678, 683-84 (1944).

The dissolved status of the local union presents yet other difficult problems, discussed in part II below.

It would also be far better to save review for a case where the arbitration language was clear and mandatory. The grievance machinery here is limited solely to intiation by employee complaints rather than the usual language allowing any party or person to take up all disputes or differences. In this instance there are still further problems, as Judge Bright in his panel dissent noted, for even if a national union would be allowed to and were to agree to arbitrate for respondents as if they were employees, there is still no assurance the national union could reach agreement with Alpha on selection of the arbitrator or that the parties could agree on what subjects would be submitted to the arbitrator or what arbitration procedures they would use, all as the arbitration clause requires as precondition. Instead of having assurance that there would be arbitration, as in *Boy's Market v. Retail Clerks,* 398 U.S. 235 (1970), at best the Court would only be able to do what it said it did not want to do in *Clayton v. International Union, UAW,* 451 U.S. 679, 693 (1981), that is, subject the complainants to energy and resource-wasting procedures without assurance of an efficacious result. With a poor, aged and ill population, that drain is much more meaningful.

With the facts so complex, it is submitted that this case does not present the type of case that allows clear and concise guidelines on any of the issues that petitioners seek to raise. Respondents have posed alternative questions should this Court consider review appropriate.

II. To Grant Review Would Require This Court To Change The Effect Of Many Of Its Prior Decisions As Well As Congressional Declaration

This Court in *Lewis v. Benedict Coal Co.*, 361 U.S. 459 (1960), would not allow plan beneficiaries to stand in the same shoes and be subject to the same defenses as the collective bargaining representative. In fact, this Court in *Schneider,* supra, cited *Benedict Coal* as reason to protect the trustees, for the trustees were representing the beneficiaries. Petitioners would now suggest this Court reverse the importance of whom is to be protected as between beneficiary and trustee, in effect now having the "tail (trustee) wag the dog (beneficiary)." That would be inconsistent with this Court's pronouncement in such cases as *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981), wherein this Court emphasized that the trustees' whole, sole and exclusive duty is to protect the interests of plan beneficiaries. *Id* at 331, 333-34.

To the extent that this Court held in *Allied Chemical Workers v. Pittsburgh Plate Glass Co.*, supra, that retirees are not statutory employees subject to exclusive representation, and that potential conflict exists as a matter of law as between retirees and the collective bargaining representative whose duties are to protect the interests of active statutory employees, petitioners also seek total reversal. Petitioners seek to assure exclusive representation and to ignore the conflict, both potential and real. Similarly petitioners would have this Court reverse its own recognition in any number of cases including *Humphrey v. Moore,* 375 U.S. 335 (1964), *Bowen v. U.S. Postal Service,* 459 U.S. 212 (1983), and *Vaca v. Sipes,* 386 U.S. 171 (1967), that the

union's duty of fair representation rises solely out of the union's then obligations under Section 9 of the NLRA, 29 U.S.C. §159.[3] In effect petitioners ask this Court to either reject Section 9 as the basis for fair representation duties, or now find contrary to *Allied Chemical Workers,* supra, that retirees are still Section 9 employees so that the union's duty of fair representation continues and the grievance procedure limited to "employees" includes retirees.

Petitioners would also have this Court revise its decision in *Vaca v. Sipes,* supra, in a most peculiar way, by finding that while unfair representation may be an exception for grievance exhaustion as to statutory employees, such exception would not exist for non-Section 9 retirees. Whereas "potential conflict" was sufficient in *Allied Chemical Workers* to bar union representation, now petitioners urge even real conflict is insufficient for respondents to raise the *Vaca* exception for retirees.

In *South Prairie Construct Co. v. Local 627 Operating Engineers,* 425 U.S. 800 (1976), this Court said that it was the function of the NLRB and not the judiciary to determine the appropriate collective bargaining representative. The decision is most applicable here because not even petitioners dispute that plaintiffs' recognized collective bargaining representative, their local union, had been dissolved. Before the appeals court petitioners sought to avoid the processes of the NLRB, including the underlying principles of majority designation by secret

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[3] The Eighth Circuit was highly critical of petitioners' bootstrapping argument renewed on page 7 of their petition that "the union"—whatever and whoever that is—"owed a statutory duty [of representation] to retirees." That's exactly what the NLRB argued in *Allied Chemical Workers,* supra, assuring this Court that unions would never agree to let retirees' interests take second place to the union's own institutional interest or those of its active voting membership. This Court did not then agree. The duty of fair representation arises solely out of Section 9 representation. This Court said in *Allied Chemical Workers* that such representation does not exist for retirees. Retirees are not employees.

ballot election, by having the district court substitute another labor organization to represent the retirees, in this case the national union or one of the two remaining Eastern locals, neither of which were the respondents' recognized or certified collective bargaining representative at such times as respondents were statutory employees. This Court's decision in *South Prairie* is one reason that makes the dissent's proposal that the district court select another organization to represent respondents in arbitration, erroneous. District court selection also flies in the face of the NLRA's demand for majority designation.

Petitioners clearly recognize that there was no NLRB certification nor recognition of any other union as respondents' collective bargaining representative, for on page 7 petitioners advise that the only rationale for their suggestion to make this change of bargaining representative, is by this Court adopting a "long-standing relationship" standard, looking to the relationship between the local union and the national union and other locals. However, to make that "jump" this Court would have to ignore another line of its own decisions finding separate identities between the local and its parent. E.g., *Carbon Fuel Co. v. Mine Workers,* 444 U.S. 212 (1979). Moreover, can this Court imagine the uproar from employers and commentators if this Court had the NLRB relax the standard stated in such cases as *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969), and its progeny, into one of some vague "longstanding relationship."

In *McDonald v. City of West Branch,* ____ U.S. ____, 80 L.Ed.2d 302 (1984), this Court held that arbitration is not necessarily appropriate for actions brought under federal statutes. See also, *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1974); *Barrantine v. Arkansas-Best Freight Systems,* 450 U.S. 728 (1981). Cf. *Kremer v. Chemical Construction Co.,* 456 U.S. 461, 478 (1982). The Eighth Circuit views the wrongful termination of plan obligations as a violation of ERISA Section

404, 29 U.S.C. §1104.[4] Petitioners would have this Court depart from its view for one statute: ERISA. The courts of appeal do not agree with petitioners. E.g., *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984) (arbitration not appropriate for retirement benefits; labor arbitrator without expertise on non-law-of-shop issues).

In the district court petitioners cited *Communications Workers v. Mountain States Telephone and Telegraph Co.*, ____ F.2d ____, 27 FEP Cases 1486 (10th Cir. 1978), to advise that they would not view the arbitrator's decision final and binding if he went outside the collective bargaining agreement and considered any other document (such as the plan or the summary plan description) or even ERISA's statutory requirements. Should the arbitrator be able to or agree to rule on plan obligations, the meaning of the plan as affected by the summary plan description, the meaning of ERISA Section 404, petitioners thus mean to attack in court if he finds in favor of respondents and the class. Under the circumstances, arbitration will not result in any efficacious decision, but simply require a poor, aged and ill population to waste their energy and resources. If petitioners are sustained, this Court would be required to change its own aversion to such waste announced in *Clayton v. International Union, UAW*, supra, 451 U.S. at 693. In this instance petitioners assure us that exhaustion would *not* lead to significant savings in judicial resources or speedy resolution,[5] the ultimate aim of this Court in *Republic Steel Corp. v. Maddox*, 379 U.S.

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[4] *Calhoun v. Falstaff Brewing Corp.*, 478 F.Supp. 357, 361 (DC Mo. 1979), opinion after trial sub nom *Dependahl v. Falstaff Brewing Co.*, 491 F.Supp. 1188 (DC Mo. 1980), modified on other grounds, 653 F.2d 1208 (8th Cir. 1981), cert den'd 454 U.S. 968 (1981).

[5] In light of petitioners' assurance to the district court it would judicially challenge any adverse arbitration determination based on plan terms, summary plan description or federal statute, petitioners' alleged concern of clogging the court dockets, made in the concluding page of their petition, rings hollow and insincere.

650, 658 (1965),[6] and *Boy's Market v. Retail Clerks,* supra, 398 U.S. at 249.

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[6] This Court did not hold in *Republic Steel,* supra, that exhaustion applies to non-statutory employees. This Court said "at all times material to [Maddox'] claim . . . Republic's industrial relations with Maddox . . . were subject to the provision of the [National Labor Relations] Act." Subsequently in *Allied Chemical Workers,* supra, this Court said retirees are not covered by that Act; they are not statutory employees. In *Republic Steel* this Court repeatedly called Maddox "an employee."

In *Republic Steel* this Court held that "severance claims are not critically unlike other types of grievances." But here benefits claims (and fiduciary breach claims, text to note 4 supra), like the trustee collection claims in *Schneider,* present "trust" claims. Even in *Republic Steel,* supra, this Court recognized it would look to see if the claim was "different in kind" from ordinary contract grievances and decided against Maddox because "his suit in the present case is simply on the contract." Respondents' suit is founded primarily on an ERISA benefits plan.

Finally this Court concluded in *Republic Steel* with the statement:

> "in neither the facts nor the pleadings is there any suggestion that Maddox could not have availed himself of the grievance procedure instead of waiting three years and bring a court suit."

In this case plant closing had occurred many months before benefit cessation and plan repudiation, and many retirees had retired even long before then. After plant closing the local union had dissolved and later the national union told respondents that it would not proceed under the grievance procedure for them, that retirees were "on their own." Petitioners cannot present the instant case for which they seek review as a *Republic Steel* case even if this Court had never decided *Allied Chemical Workers,* supra.

Even if *Republic Steel* were relevant, this Court recognized that there may be some types of specific grievances that were "so different in kind as to justify exception." Hence, even if respondents here could be called "employees" as petitioners ask this Court to do, we submit this Court's later decision in *Allied Chemical Workers,* allows a retiree claim for vested life and health insurance benefits to be classified as "so different in kind." However, respondents submit this is not the appropriate case to review that question in light of the other facts to which this Court addressed itself in its concluding remarks in *Republic Steel,* supra. The Eighth Circuit was correct in its analysis to give this Court's more recent decision in *Allied Chemical Workers* a stronger voice in its decision than the earlier decision in *Republic Steel.*

Although the court of appeals en banc in the instant case for which petitioners seek review, clearly explained a difference between the decisions of lower courts petitioners now cite and the case here, recognizing that a collective bargaining agent "if it chooses," may seek to assert retiree rights to protect the interests of statutory employees under a collective bargaining agreement,[7] the instant case is one primarily over petitioners' repudiation of plan rights of non-statutory employees brought under ERISA Section 502, 29 U.S.C. §1132. That section makes no provision for nor gives a union a role as a party plaintiff in an ERISA action for plan violation. The effect of the present petition for review is to suggest that notwithstanding Congressional allowance ERISA beneficiaries may sue, a union and employer may control and interfere with rights and remedies Congress expressly granted to plan participants and beneficiaries who aren't even statutory employees or in the bargaining unit. Until the enactment of ERISA, retirees' only way to achieve federal review had been to rely upon their collective bargaining agreement. *Allied Chemical Workers,* supra, 404 U.S. at 181 n.20. Notwithstanding the enactment of ERISA since that decision, petitioners would have this Court return to the collective bargaining agreement as the sole source of retirees' rights in federal actions.

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[7] The question presented in those cases and here is not focused on whether the employer is contractually committed to arbitrate under an arbitration clause that allows no arbitration to proceed until after the parties further agree on selection of the arbitrator, arbitration procedures and issues. Respondents do not seek to force Alpha to arbitrate. Nor is the question presented here in terms of Alpha's duty to arbitrate at all.

Rather, the question here is whether third-party beneficiaries who are not statutory employees, are bound to accept exclusive representation by a union which is not their collective bargaining representative and owes them no Section 9 duties of fair representation, and proceed under a grievance procedure limited to statutory employees. The latter was certainly not the question in *Steelworkers v. Canron, Inc.,* 580 F.2d 77 (3rd Cir. 1978), a decision petitioners urge on this Court.

Petitioners in seeking review do not propose that the Court consider its prior decisions nor do petitioners suggest any reason now for this Court to change or reverse the rationale for the above cited long-standing decisions. Similarly, petitioners for review do not suggest that this Court even consider in its review the demands in ERISA Section 503, 29 U.S.C. §1133, requiring a full and fair review by a fiduciary. That is one of the respondents' questions presented, should this Court decide this is an appropriate case to grant review.

III. The Eighth Circuit Correctly Applied This Court's Decision In *Schneider,* Supra, To The Facts Of This Case

This Court held in *Schneider,* supra, that the presumption favoring arbitrability is not the proper rule in determining whether provisions for arbitration between the employer and the union be applied to disputes between the trustees and the employer, even if the dispute raises questions calling for interpretation of the union agreement. This Court treated actions under a plan as "trust" actions. In this case the plan obligation is separate and calls for *no interpretation* of the collective bargaining agreement, making respondents' case far stronger against arbitration than the trustees had in *Schneider.* Moreover, this Court in *Schneider* held that because of the principles previously adopted in *Lewis v. Benedict Coal Corp.,* supra, a beneficiaries' protection case, "We adopt the same approach here and decline to adopt a mechanical application" of the arbitration trilogy. Petitioners in seeking certiorari ask this Court to make the "mechanical application" for all but multi-employer plan trustees.

This Court in *Schneider* called for careful inquiry to see whether the plan or the union contract demonstrated the parties' specific intent that the union arbitrate questions of plan construction. This would call for an examination of the circumstances surrounding the execution of both the plan and

union agreement, an examination that the district court in the decision petitioners exclude from their appendix, had called respondents frivolous for suggesting be made. The plan was unilaterally created outside of collective bargaining. Many of the respondents had retired and "vested" their insurance benefits for life long before anything was said in the plan about resolution of disputes.

When the plan document was amended finally to refer to resolution of plan disputes, there was no showing that the referral was intended to apply to those who retired. In fact respondents' evidence proffered by affidavit since there was no hearing, was that Alpha historically rejected union attempts to represent retirees. Petitioners offered no evidence to show that the rewording of the plan was intended to change the union's non-role as to retirees or to thereafter require the local union to represent the retirees under a duty of fair representation. The grievance/arbitration procedure in the Local Agreement restricted that procedure solely to employees. It's clear no party had retirees in mind under that grievance procedure or plan resolution referral. Thus in the summary plan description petitioners noted an alternative review procedure was available to respondents; they were told they did not have to use the contract grievance procedure.

Considering that the arbitration trilogy presumption is lost in ERISA suits, the plan's dispute referral provision is entitled to even less meaning, for the "Basic Agreement" to which it refers for resolution contains no dispute resolution procedures. The plan referral clause is thus totally meaningless. The district court avoided this dead-end by using the trilogy presumption to reform the plan's referral language to change "Basic" to "Local," even though the grievance procedure in the "Local Agreement" was limited solely to grievances of statutory employees and designed to accomplish that purpose only. Petitioners even conceded on page 26 of their appeal brief to the Eighth Circuit that the grievance arbitration clause is "no model

of draftsmanship." With the trilogy presumptions lost, petitioners can find no clear mandatory arbitration clause for retirees in either the plan, the Basic Agreement or the Local Agreement.

Because the grievance procedures in the Local Agreement are limited solely to grievances brought by statutory employees, this Court's statement in *Schneider* that "no suggestion that either the [employer] or the Union intended to require the arbitration of disputes between the trustees and the employer," 80 L.Ed.2d at 375, would apply equally well here to disputes raised by beneficiaries who are not statutory employees. This Court's conclusion in *Schneider* that it was "unreasonable to infer that the union agreement or the plan intended the trustees to rely on the union to arbitrate their disputes with the employer," *ibid,* is as equally applicable here. Petitioners' own summary plan description providing an alternative procedure,[8] further supports the lack of reason for petitioners to infer that either the Local Agreement or the plan intended the beneficiaries to rely upon the union to arbitrate retiree disputes with the employer.

Since *Schneider* was not a benefit denial case, this Court had no reason to cite ERISA §503, 29 U.S.C. §1133, as additional support. While petitioners complain the Eighth Circuit rejected arbitration in favor of the alternative use of ERISA Section 503 procedures, 29 U.S.C. §1133, creating what petitioners call a "loophole," it was Congress who rejected arbitration in favor of Section 503 procedures. H.R. Rep. No. 93-1280, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 5108. And petitioners created their own "loophole" by providing an alternative procedure in the summary plan description.

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[8] The summary plan description's allowance of review by ERISA Section 503 procedures, 29 U.S.C. §1133, without resort to the contractual grievance procedure, is akin to the express allowance in the separate trust agreement in *Schneider* allowing the fiduciary to proceed other than through the collective bargaining representative.

One circumstance this Court mentioned in *Schneider* as relevant in determining what the parties meant, is whether a showing can be made that the local union intended to incur arbitration expenses at the request of those the plan protected, there the trustees, here the retirees. 80 L.Ed.2d at 375. Petitioners offered no evidence on this point beyond petitioners' admission that the arbitration language is "no model" of clarity. Respondents offered evidence by affidavit that when they pleaded with the national union for help and guidance, respondents were told that the union had no intention of taking any action to incur expense, that the retirees were "on their own." This showing was further bolstered by respondents' offer of evidence by affidavits in the district court, showing that historically petitioners had never allowed the union to negotiate for retirees and that the union never viewed itself as incurring any obligation or expense to take up grievances on the behalf of retirees.

From this evidence we submit this Court's statement in *Schneider* that

> "We find particularly implausible petitioner's further argument that a duty of fair representation may be implied, and that this should compel the Union to pursue the trustees' uncompromised claims through arbitration. There is simply **no evidence that the Union owes any statutory or contractual duty of fair representation to the trustees.**" 80 L.Ed.2d at 375 (emphasis supplied)

applies with full force here.

This Court's statement is particularly compelling in light of the fact that in note 22, 80 L.Ed.2d at 376, this Court advised that the duty of fair representation runs only to members of the collective bargaining unit and is only "**coextensive with its statutory authority** to act as the exclusive representative for all employees within the unit." Petitioners simply seek to avoid this Court's recognition of the limits of exclusive representa-

tion, much as we noted petitioners seek to avoid the meaning of Section 9 representation and all that entails as envisioned by this Court in *Humphrey v. Moore,* supra, and *Allied Chemical Workers,* supra.

This Court in *Schneider* went on to say in the text of its opinion

> "In the absence of evidence we will not engage the **unlikly inference** that the parties to these agreements intended to require the trustees to rely on the union to arbitrate their disputes with the employer." 80 L.Ed.2d at 376 (emphasis supplied)

At that point this Court again dropped another footnote indicating that the duty of fair representation is not easily applicable to nonbargaining unit persons. 80 L.Ed.2d at 376 n.23. This Court said it was wary of imposing such a duty on the union. Hence respondents really cannot complain about the treatment they received from the national union—they were "on their own." Petitioners totally ignore this Court's reasoning, still hoping this Court will engage in the "unlikely inference" the union intended to arbitrate retiree disputes and thus petitioners seek a "mechanical application" of the arbitration trilogy for all but multi-employer plan trustees.

IV. Petitioners Failed To Include In Their Appendix All Decisions Below

This Court requires petitioners to include all relevant decisions below. Petitioners failed in include one of the district court decisions from which respondents took an appeal to the Eighth Circuit. See note 1 supra. The petition should therefore be dismissed.

CONCLUSION

As long as *Allied Chemical Workers,* supra, is the law, that retirees are not statutory employees, no reason appears to review rights and obligations of unions to retirees in the context of an ERISA action brought by the retirees against those responsible for denying benefits and repudiating plan obligations, as Congress expressly authorized. 29 U.S.C. §§1001(b), 1132. This Court has already made it quite plain in *Schneider* where it stands. Petitioners avoid this Court's reasons for its decision in *Schneider.*

Both panel and en banc decisions of the court of appeals are correct and fully comport with the decisions of this Court, and are not in conflict with the decisions of any other circuit court of appeals. The petition for a writ of certiorari presents no issue worthy of this Court's consideration, and it should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 82-1413-C(4)

Robert Anderson, Jr., et al
Plaintiffs,

v.

Alpha Portland Industries, Inc., etc., et al
Defendants.

NOTICE OF APPEAL

(Filed March 15, 1983)

Notice is hereby given that plaintiffs hereby appeal to the United States Court of Appeals for the Eighth Circuit from the orders issued by this Court on November 12, 1982 granting summary judgment and on March 4, 1983 denying new trial and reconsideration, which orders are now final judgments of the Court.

March 15, 1983

/s/ Sheldon Weinhaus MBE #16699

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APPENDIX B

Statutes Cited

29 U.S.C. §157

Employees shall have the right to self-organization, to form, join, or assista labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. §159(a)

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

29 U.S.C. §185(a)

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the

United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. §1001(b)

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

29 U.S.C. §1022

(a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. . . .

(b) The plan description and summary plan description shall contain the following information: The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the

provisions providing for nonforfeitable pension benefits; circumstrances which may result in disqualification, ineligiblity, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133 of this title).

29 U.S.C. §1104(a)(1)(A)(i)

Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; . . .

29 U.S.C. §1132(a)(1) and (3)

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

29 U.S.C. §1133

In accordance with regulations of the Secretary, every employee benefit plan shall—

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.